SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 275

LAWRENCE DYER, APPELLANT,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

	Original	Print
Record from Circuit Court of Rock County, Wisconsin	1	1
Petition for writ of mandamus	1	1
Return of defendants	4	3
Decision and order denying writ	7	4
Judgment	11	7
Stipulation of testimony and exhibit in lieu of bill of exceptions	12	8
Testimony of Lawrence Dyer	13	9
Stanley J. Goldschmidt	14	10
Defendant's Exhibit No. 1—Milk ordinance of City of Beloit	17	13
Proceedings in Supreme Court of Wisconsin	30	23
Caption (omitted in printing)	30	
Notice of appeal from Circuit Court	31	24
Bond on appeal (omitted in printing)	32	
Minute entry of argument and submission	34	25
Judgment	35	25
Opinion, Barlow, J.	37	26
Petition for appeal	44	30
Assignments of error and prayer for reversal	47	32
Order allowing appeal	50	33
Bond on appeal (omitted in printing)	55	
Citation and service (omitted in printing)	57	
Praecipe for transcript of record	81	34
Clerk's certificate (omitted in printing)	84	
Statement of points to be relied upon and designation of parts of record to be printed	85	35
Order noting probable jurisdiction	88	36

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[fol. 1] [File endorsement omitted]

IN CIRCUIT COURT OF ROCK COUNTY

STATE OF WISCONSIN

LAWRENCE DYER, Petitioner,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin; and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, Defendants

PETITION FOR WRIT OF MANDAMUS—Filed September 25, 1946

To: Circuit Court for Rock County:

The petition of Lawrence Dyer respectfully alleges and shows to the court:

1. That at all times herein mentioned petitioner was and now is engaged in the business of selling milk and milk products;

2. That at all times herein mentioned the defendant A. D. Telfer was City Manager of the City of Beloit, Rock County, Wisconsin, and is now said City Manager; that at all times herein mentioned R. H. Calland was and now is City Clerk of said city; and that at all times herein mentioned, as petitioner is informed and believes, the defendant Stanley J. Goldschmidt was and now is City Sanitarian of said city;

3. That heretofore petitioner, pursuant to the ordinances of the City of Beloit, Rock County, Wisconsin, made application to the defendant City Clerk of said city for a license as a milk dealer and/or distributor in the City of Beloit, Rock County, Wisconsin;

4. That said application for license by said petitioner was signed by petitioner and contained all the required information to be contained in said application, and was presented to said City Clerk for presentation to the afore-

said City Council of the City of Beloit, and was accompanied by a tender of the license fee required for said license;

[fol. 2] 5. That said application for license, as petitioner is informed and believes, was presented by the aforesaid defendant City Clerk to the City Council of the City of Beloit, Rock County, Wisconsin on August 29, 1946; and that at a meeting of said City Council on said date said City Council rejected said application and refused to issue the aforesaid requested license;

That, as petitioner is informed and believes, said application was rejected and said license refused because of a provision, and only because of said provision in the aforesaid ordinances of the City of Beloit, to-wit:

> "(X) General Provisions:
>
> • • • • • • •
>
> "(2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

6. Petitioner further alleges that he has complied with all of the provisions of the said Beloit Milk Ordinance other than the provision above set forth, and that he is willing to comply and stands ready to comply with all of the provisions of said milk ordinance except the provision above set forth;

7. That said defendants above named unreasonably and arbitrarily rejected petitioner's application for a license as aforesaid and unreasonably and arbitrarily refused to grant and issue a license as milk dealer and/or distributor to your petitioner;

8. Petitioner further alleges that he has and now does comply with all the requirements of said ordinance above referred to except the provision above quoted, and *as* to that, petitioner states that the same is unconstitutional, and that the refusal of said defendants to recommend, grant and issue a milk dealer's license to your petitioner deprives petitioner of his property and a right to make a livelihood without due process of law and is an illegal interference with interstate commerce.

[fol. 3] Wherefore, petitioner prays that peremptory mandamus be issued out of the court commanding the said A. D.

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Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as Clerk of the City of Beloit, Rock County, Wisconsin, Stanley J. Goldschmidt as City Sanitarian of the City of Beloit, Rock County, Wisconsin, and the City Council of the City of Beloit, Rock County, Wisconsin, to issue a license to your petitioner as milk dealer and/or distributor, and for such other judgment or order as may be proper.

McGowan, Geffs, Geffs & Block, Attorneys for Petitioner, Lawrence Dyer.

Duly sworn to by Lawrence Dyer. Jurat omitted in printing.

[fol. 4] [File endorsement omitted]

IN CIRCUIT COURT OF ROCK COUNTY

[Title omitted]

RETURN OF DEFENDANTS—Filed September 25, 1946

We, A. D. Telfer, R. H. Calland and Stanley J. Goldschmidt, as City Manager, City Clerk and City Sanitarian, respectively, of the City of Beloit, Rock County, Wisconsin, do hereby make return to the alternative writ of mandamus, hereto annexed, and for cause why we have not and cannot lawfully do the things therein commanded, respectfully represent and show to the Court:

That the petitioner, Lawrence Dyer, applied for a license to sell milk within the City of Beloit, Rock County, Wisconsin, although admitting that he expected to obtain the milk to be sold in said city from the pasteurization plant of the Dean Milk Company at Chemung, Illinois, a village which is a distance of thirty to thirty-five miles from the City of Beloit; that these defendants rejected the [fol. 5] application of the petitioner for such license because of a clause in a city ordinance of Beloit which provides that no pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in said city; that, in the judgment of these defendants, such provision represents a valid exercise of the regulatory authority of the City of Beloit;

These defendants further allege that the issuance of peremptory writ of mandamus, compelling the City of Beloit to issue a license to the petitioner to sell milk in said city, would, under all the circumstances, be inequitable and contrary to the public interests; that the city ordinance of Beloit provides no- only for the inspection by city employees of pasteurization plants, but also for the inspection of dairy farms serviceing such plants; that the City of Beloit employs too full-time inspectors for the purpose of making sanitary inspections not only of dairy plants and dairy farms, but also of other business places, such as taverns, restaurants, grocery stores, meat markets, confectionery stores and soda fountain places; that in the event a license were to be granted to the petitioner, it would be necessary for the City of Beloit to employ a third inspector merely for the purpose of performing the additional work incidental to the issuance of a license to the petitioner; that the supply of milk now delivered to Beloit Dairy plants far exceeds the local demand, and that a great part of the milk produced in the rural are- immediately sur- [fol. 6] rounding Beloit is shipped from Beloit to other places for consumption.

All of which is respectfully submitted.

A. D. Telfer, R. H. Calland, Stanley J. Goldschmidt.

Duly sworn to by A. D. Telfer, et al. Jurat omitted in printing.

[fol. 7] [File endorsement omitted]

IN CIRCUIT COURT OF ROCK COUNTY

[Title omitted]

DECISION AND ORDER DENYING WRIT—Filed December 9 1946

This action arises out of the refusal of the Common Council of the City of Beloit to grant a license to the Petitioner to sell and distribute pasteurized milk within the City of Beloit.

The milk which the Petitioner prop-sed to sell and deliver in the City of Beloit, would be pasteurized at the Dean Milk Company plant located at Chemung, Illinois, son-

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twenty-five to thirty-five miles distant from said City of Beloit.

Section 8.09 X (2) of the General Ordinances of the City of Beloit, provides that:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Avenue, in the City of Beloit."

The Petitioner's application for a license was filed on August 29, 1946, and was rejected at a regular Council meeting held on August 30, 1946, for the reason that the [fol. 8] pasteurization plant of the Dean Milk Company was located more than six miles from the intersection of the two above named streets in the City of Beloit, and that proper inspection would require unreasonable additional expense to the city of Beloit.

The Petitioner brings this mandamus proceeding to compel the issuance of the license, claiming that the City of Beloit unreasonably and arbitrarily refused to grant the license, and that such refusal deprives him of his property rights and of constitutional rights without due process of law, and is an illegal interference with interstate commerce.

No objection is raised by the City as to the Grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit; i. e., a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance.

A stipulation of facts was entered into between Council respectively, and some testimony taken upon the hearing. The only issue involved is as to whether or not the six mile provision of the Beloit Ordinance constitutes an unreasonable interference with the rights of the petitioner.

It is well recognized throughtout this country, and some other countries, that milk is a valuable and universal food product; that it is peculiarily liable and subject to contamination and adulteration; that the business of producing [fol. 9] and distributing milk is one which, when improperly

conducted or carelessly handled, may seriously affect the public health; that in the interest of public health and safety the regulation of the production and distribution of milk is within the police power of the sovereignty; and that strict regulatory provisions may be enacted and enforced to guarantee to the consumer that protection which the sovereignty owes to him.

It is now a universal requir-ment and practice that milk shall be inspected as its source of supply, in order to determine, not only its proper grade, but whether the conditions surrounding its production are sufficiently sanitary, etc. Qualified inspectors are therefore appointed or hired by municipalities to make periodical inspections.

The petitioner herein has made no offer to assume or repay the additional expense necessary to have such additional inspections made. The cases cited by petitioner's counsel, where ordinances similar to the Beloit Ordinance have been held invalid, are cases where milk concerned was produced in a territory where inspections were already being made by regular inspectors of the particular municipality involved, and would incur no particular additional expense to the City.

Zoning ordinances are valid if reasonable and not intended as a trade barrier. They must also be reasonable [fol. 10] and not arbitrary, capricious or discriminating. I am aware that the mere fact that a City already has a sufficient number of milk dealers, or has an adequate supply of milk, would present no valid reason for the refusal of a license to sell milk in the City, as that would then be an unfair and illegal interference with property and constitutional rights.

I Am Therefore of the Opinion, that under all the circumstances appearing in this proceeding, the Or-inance here involved was not intended as a trade barrier, and is not unreasonable, arbitrary or capricious, and is therefore constitutional and valid.

The petition for a per-mptory writ requiring the City of Beloit to Issue a license to the petitioner is therefore ordered denied.

Dated December 7, 1946.

By the Court.

Jesse Earle, Circuit Judge.

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[fol. 11] [File endorsement omitted]

In Circuit Court of Rock County

Lawrence Dyer, Petitioner,

vs.

City Council of the City of Beloit, Rock County, Wisconsin; A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin; and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, Defendants

Judgment—Filed December 20, 1946

This action having come on for trial upon the petition of the relator herein and the return of the defendants, and having been tried by the Court, and the Court having determined, as a conclusion of law, that the relator is not entitled to a peremptory writ of mandamus, as prayed in the petition;

Now, Therefore, on motion of C. L. Haugan and Arnold, Caskey & Robson, attorneys for the defendants,

It Is Ordered and Adjudged that the request of the relator for the issuance of a peremptory writ be denied, and that his petition be dismissed, and that the defendants do recover of the said relator the sum of One Hundred Six and 90/100 Dollars ($106.90) as their costs and disbursements in this action, as taxed.

Dated December 20th, 1946.

By the Court:

Jesse Earle, Judge.

[fol. 12] [File endorsement omitted]

IN CIRCUIT COURT OF ROCK COUNTY

[Title omitted]

STIPULATION OF TESTIMONY AND EXHIBIT IN LIEU OF BILL OF EXCEPTIONS—Filed in Supreme Court, July 25, 1947

It Is Hereby Stipulated, in open court, by Lawrence Dyer, Petitioner, by McGowan and Geffs his attorneys, and the defendants by C. L. Haugan, City Attorney for the City of Beloit and Earl J. Caskey, their attorneys; that on the 29th day of August, 1946, the petitioner, Lawrence Dyer, made written application to the City of Beloit for a license to distribute the milk of the Dean Milk Company in the City of Beloit, and that in so doing he has complied with all of the terms of the City Ordinance in Beloit, except in the one respect, that that past-urization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the corner of East Grand Avenue and State Street in the City of Beloit; that the pas-tu-rization plant of the Dean Milk Company, from which the Petitioner will receive his milk for distribution in Beloit is between teenty-five and thirty miles from the point indicated by the ordinance in the City of Beloit.

It Is Also Stipulated, that in accordance with the terms of the City Ordinance, the petitioner has filed with the City Clerk a list of the farmers who bring their milk to the Chemung dairy of the Dean Milk Company, and that the number of farms so named amounts to one hundred ninety-seven; that such farms are located in the Counties of McHenry, Boone, and Winnebago in the State of Illinois, and Walworth County in the State of Wisconsin.

[fol. 13] It Is Further Stipulated, that on the 30th day of August, 1946, the City Council of Beloit rejected the application of the petitioner for such milk license upon the ground that the past-urization plant of the Dean Milk Company was located more than six miles from the intersection of the two above named streets in the City of Beloit.

It Is Further Stipulated, that it is the intention of the petitioner, in the event a license is granted to him, to obtain milk pasteurized at the factory of the Dean Milk Company at Chemung, Illinois and to truck such milk to the

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City of Beloit for sale in the City of Beloit for at retail stores.

Dated this 26th day of September, 1946.

LAWRENCE DYER called as witness:

Examination.

By Mr. Block:

My name is Lawrence Dyer; I am the petitioner; and applicant for milk distributor's license from the City of Beloit, Wisconsin; application made some time in August; I intend to distribute milk to retail merchants in the City of Beloit, and they in turn will sell it to consumers. This milk is pasteurized at Chemung, Illinois. The milk is obtained from farmers and brought to the Dean plant at Chemung, Illinois, where it is cooled, pasteurized and bottled in paper cartons of 1 quart each. These cartons are placed in cases holding 20 quarts, which I place in my truck and carry to retail merchants. This milk is Grade A milk and its composition qualifies as to the sanitary conditions and quality required for the Beloit City Ordinance.

Cross-examination.

By Mr. Caskey:

I intend to deliver milk to the City of Beloit every day except Sunday. The milk that I intend to deliver is received at the plant the same day it is delivered and would be delivered normally within two hours after being pasteurized.

[fol. 14] Redirect examination.

By Mr. Block:

The milk is cooled to Thirty-four degrees when it comes from the pasteurizer and placed in paper cartons. My truck is insulated and in warm weather I use ice. When the milk arrives at Beloit, its temperature would not be more than Forty-two Degrees Fahrenheit. I had occasion to check the bacteria count on this milk with the bacteria count of milk sold in Beloit, and in every instance it was

lower than other milk pasteurized and sold in Beloit. This milk is sold in the City of Chicago and suburbs. Each farm which supplies milk to the Dean plant is inspected every week and sometimes twice a week by the Chicago Board of Health. The Dean Milk Company also has its own inspectors who inspect the source of the milk at the farms. The City of Chicago and its suburbs operate under what is known as the Model Milk Ordinance formulated by the Public Health Service of the United States. The City of Chicago operates under what is known as the Mayor Kelly Milk Ordinance, which is as stringent as the Model Milk Ordinance formulated by the Public Health Service of the United States.

STANLEY J. GOLDSCHMIDT called as witness on behalf of defendants, testified:

Examined.

By Mr. Caskey:

My name is Stanley J. Goldschmidt and I am City Sanitarian of the City of Beloit, Wisconsin, and I have had that position for thirteen months. Before being employed by the City of Beloit, I did similar work for Rock County for about four years. My duties to the City of Beloit are in charge of the whole sanitary program under the Health Department of the City of Beloit. This entails, with the aid of one inspector, inspection of all public eating places, which include approximately 38 restaurants, 16 sode *mountains*, about 18 light lunch establishments, approximately 20 confectionery stores, 81 combination groceries and markets, 8 bakeries, 53 taverns and clubs; by clubs I mean those having a liquor license which is similar to a tavern although being semi-private. I also inspect dairies, eight dairies and about 165 firms that sell milk to these dairies. [fol. 15] I also supervise collection of garbage which details employment of approximately 10 men and the operation of three or four trucks and the collection of cans from approximately 8,500 to 8,700 households, about half of these having more than one can of garbage.

"The Court: Are these inspections made within six miles of the City of Beloit?

"A. Yes."

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I also supervise inspection of those who handle food, and we have approximately 1500 people engaged in the handling of food in the above mentioned establishments, and we require that these people submit to physical examination once a year or oftener if necessary as deemed by the health officer, and along with this program it is my duty to check these 1500 people to find out if any new employees are coming into these establishments and to do field work for the clinics which are held for the examination of these people.

I also handle any complaints that come in the office regarding sanitary conditions. These complaints are received daily sometimes as high as ten a day. I also through our department take care of quarantine and contagious diseases. This is necessary because we have a part time health officer. I have one man, Harold Taylor, that helps me. The work keeps both of us busy all the time and it is necessary for me to be in the office part of the time to handle the correspondence. It would not be possible for Mr. Taylor and myself to inspect a considerable number of new dairies unless we had another inspector added to our department. We inspect all dairies which now bring milk to Beloit. Some dairies haul Grade B milk and some grade A. On the grade A I find we have between 106 to 111 farms. Yesterday we dropped three from the A side and placed them on the B side. Grade A farms are inspected periodically. These inspections entail sediment tests, blue tests, sometimes tests to laboratory for blue plate count. On the B side there is approximately 319 farms. These farms are not inspected by our department due to the fact that grade B milk is used in manufactured products, and that inspection is taken care of by the State Department of Agriculture. Whenever we need extra farms for milk on [fol. 16] the A side we pick out a B farm and if the bacteria examination shows it is good we make a trip to the farm and with some small amount of changes we are able to put it on the A side. We give what assistance we can to the State Department of Agriculture in the inspection of the B farms.

We make no inspections of the B farms unless it is being transferred to the A side. Grade A milk is delivered for sale in Beloit and Grade B is manufactured into mixes and not delivered for sale in Beloit. There is more milk coming into Beloit every day than what local people use.

There is more grade B milk delivered than there is grade A milk. The distance traveled inspecting Grade A farms is a radius of 5 to 6 miles from Beloit. All the pasteurization plants delivering milk within Beloit are located within 6 miles from the corner of State and Grant Avenue. If this license was granted, it would be necessary for the City of Beloit to hire another inspector.

Cross-examination.

By Mr. Block:

We inspect grade A farms about twice a year. These farms are within a radius of six miles from Beloit. There are 8 pasteurization plants within the six mile limit and there are no pasteurization plants outside of this six mile limit, that sell milk to Beloit.

My opposition to granting a license to Mr. Dyer was based upon the proposition that the pasteurization plant where he received his milk was located more than six miles from State and Grand Avenue, City of Beloit.

I do not feel that my department can take on any more inspections for producers or plants without the addition of an extra man.

"Q. Let's put it this way. Assuming that another pasteurization plant located itself within the six mile zone, and they obtained their milk from we will say 150 additional [fol. 17] producers that are not selling milk to Beloit now, in your opinion would you have to then employ an additional inspector because of the amount of work you now have?

"A. You sir, that would be my opinion that we would have to if there was that many farms, 150 farms, additional farms.

"Q. Regardless of location, whether within the zone or outside of zone?

"A. That is right."

There is no objection to the quality or sanitary condition of the milk that Mr. Dyer intends to deliver to the City of Beloit that I know of, and we have on one or two occasions delivered it to the State Laboratory of Hygiene. I would say that it was about the average of the milk sold in Beloit. It would not be any worse or any better.

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Redirect examination.

By Mr. Caskey:

An additional inspector would cost the City of Beloit about $200.00 a month plus traveling expenses. It would be hard to say whether his work would be devoted to inspecting additional farms without first laying out a program.

City Ordinances of the City of Beloit marked Defendant's Exhibit 1 received in evidence.

DEFENDANT'S EXHIBIT 1, BEING THE MILK ORDINANCE OF THE CITY OF BELOIT

Section 8.09: Licensing and Enforcement:

(1) It shall be unlawful for any person, firm, association or corporation to sell or distribute milk, cream, skim milk or buttermilk in the limits of the city of Beloit unless such person, firm, association or corporation shall possess a license or permit therefor granted by the City of Beloit. [fol. 18]. No license fee shall be required, however, of any person selling milk or milk products to any dairy. If such person, firm, association or corporation shall deliver such milk or milk products from house to house he shall be required to have a license, the fee for which license shall be $10.00 per year. If such person, firm, association or corporation shall — such milk or milk products from any store, hotel or eating place, a permit shall be required the fee for which shall be $1.00 a year.

(2) An application for such license or permit shall state the name and address of the persons having control of all cows or herds producing the products to be sold or distributed, and the address of the premises where all such cows or herds are kept.

(3) The license shall be obtained from the City Clerk. This license shall be valid from July 1st to June 30th inclusive of the year issued, and those licensed in the interim shall pay the full fee for the remainder of the year in which they are licensed. The Health Officer shall have charge of the enforcement of this act.

(4) The sale or distribution of milk, cream, skimmed milk, buttermilk and milk products within the city, except in conformity with the following requir-ments, is hereby prohibited.

(5) After the issuance and delivery of the license, any change of location of the place of business made by the licensee shall render his license invalid, unless the Health Officer in writing grants continuance of said license.

(6) No such license shall be issued for more than one year and no license shall be valid after the last day of June next following the date of issuance thereof.

(7) The City Clerk shall furnish two metal tags not less than 4x8 inches in size to each licensee delivering milk in wagons, motor cars, or other vehicles who procures a milk license and shall have paid the City Clerk the proper fee. The tags shall have marked upon them the words "Milk, Beloit, 19—, No. —," being the year during which the license expires and the serial number of the same, which license plate shall at all times be conspicuously displayed on both [fol. 19] sides of such vehicle and all such plates shall be removed immediately upon the expiration or revocation of the license under which they were granted. In the event a license place is lost, an additional fee of fifty cents (50¢) per pair will be charged. Each vehicle shall carry two such license plates. The charge for such plates shall be $1.00 per set of two after the set delivered in addition to the first one.

(A) Milk: (1) Milk is hereby defined to be the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and five days after calving or as much longer as may be necessary to render the milk practically colostrum free, which contains not less than 8½% of solids not fat, and not less than 3% of milk fat. It shall be free from dirt, filth, foreign substance, added water, adulterants and preservatives or added dried or condensed milk products. Whole milk sold or distributed for direct human consumption shall be classified as "raw milk" or "pasteurized" milk, except as herein specified under the term "special grades."

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Pasteurized Milk

(C) Pasteurized Milk: (1) Pasteurized milk is milk the average bacterial plate count of which does not exceed 30,000 per c.c. or the average reduction time is not less than 6 hours.

(2) Pasteurized milk is milk the average bacterial plate count of which does not exceed 200,000 per c.c. or the average reduction time of which does not exceed 6 hours at any time before pasteurization, which has been pasteurized and cooled in a milk plant conforming with all the following items of sanitation and the average plate count of which at no time after pasteurization and until delivery exceeds 30,000 per c.c.

(3) The terms "pasteurization," or "pasteurized," and similar terms shall be taken to refer to the process of heat-[fol. 20] ing every particle of milk and milk products to at least 143 degrees F. and holding at such temperature for at least 30 minutes or to at least 160 degrees F. and holding at such temperature for at least 15 seconds, in equipment approved by the Health Officer and properly operated; provided, that nothing contained in this definition shall be construed as disbarring any other process which has been demonstrated to be equally efficient and is approved by the State Department of Agriculture.

(4) The floors of all rooms in which milk is handled shall be constructed of concrete or other equally impervious and easily cleaned material and shall be smooth, properly drained and provided with trapped drains and kept clean.

(5) The walls and ceilings of rooms in which milk is handled or stored shall be frequently painted with a light colored paint or finished in a manner approved by the Health Officer and kept clean.

(6) All openings into the outer air shall be effectively screened and all means necessary for the elimination of flies shall be used.

(7) All rooms shall be well lighted and ventilated.

(8) The various milk plant operations shall be so located and conducted as to prevent any contamination to the milk or to the sterilized equipment. There shall be separate rooms for (a) the pasteurizing, cooling, and bottling

operations; (b) the container washing and sterilizing operation. Cans of raw milk shall not be unloaded directly into the pasteurizing room. Pasteurized milk shall not be permitted to come into contact with equipment with which unpasteurized milk has been in contact subsequent to disinfection. Rooms in which milk or cream or sterilized utensils or containers are handled or stored shall not open directly into and stable or living quarters.

(9) Every milk plant shall be provided with toilet facilities conforming with the ordinances of the city of Beloit. There shall be at least one room or vestibule not used for milk purposes between the toilet room and any room in which milk or milk products are handled or stored. The [fol. 21] doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair and well ventilated. In case privies or earth closets are permitted and used they shall be separate from the building and shall be of a sanitary type constructed and operated in conformity with the ordinances of the city of Beloit.

(10) The water supply shall be easily accessible, adequate and of a safe, sanitary quality.

(11) Washing facilities shall be provided including hot, running water, soap and sanitary towels or a type approved by the Health Officer. The use of the common towel is prohibited.

(12) All piping used to conduct milk or milk products shall be sanitary milk piping of a type which can be easily cleaned with a brush. Pasteurized milk and milk products shall be conducted from one piece of equipment to another only through sanitary piping.

(13) All equipment with which milk comes in contact shall be constructed in such a manner as to be easily cleaned.

(14) All wastes shall be disposed of in conformity with the requirements of the Health Officer.

(15) All multi-use milk containers and milk apparatus shall be thoroughly cleaned after each usage and sterilized in a manner approved by the Health Officer immediately after usage.

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(16) After sterilization all bottles, cans and other containers shall be stored in such manner as to be protected from contamination.

(17) Between sterilization and usage and during usage, containers and equipment shall be handled or operated in such manner as to permit contamination of the milk.

(18) The time and temperature record charts shall be dated and preserved for a period of one year for the information of the Health Officer.

(19) All milk not pasteurized within two hours after it is received at the plant shall be immediately cooled to a tem- [fol. 22] perature of 50 degrees F. or less and maintained thereat until pasteurized, and all pasteurized milk shall be immediately cooled to a temperature of 50 degrees F. or less and maintained thereat until delivery.

(20) Overflow milk shall not be sold for human consumption.

(21) Milk to be consumed in the form of whole milk shall be delivered to the final customer within thirty-six hours of the time of pasteurization. Milk shall not be repasteurized.

(22) All persons coming in contact with the milk or milk products containers or equipment, shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

(23) Every person connected with the pasteurizing plant whose work brings him or her in contact with production, handling, storage or distribution of milk or milk products shall have within twelve months passed a medical examination satisfactory to the Health Officer.

(24) Notice shall be sent to the Health Officer immediately by a proprietor or manager of a pasteurizing plant of any case of sickness occurring among the personnel or families of personnel working in the plant.

(25) Milk brought to the pasteurizing plant must be delivered promptly or it must be cooled to less than 60 degrees F. within two hours of the time of milking. It shall come from dairies or dairy farms conforming to the items of sanitation specified herein.

(D) Cream: Cream is that portion of the milk, rich in milk fat, which rises to the surface of the milk standing, or is separated from it by centrifugal force, is fresh and clean, and which contains not less than 18% of milk fat. Cream sold in the city of Beloit shall be known as raw cream or pasteurized cream in addition to such names as indicate its various standards.

(E) Raw Cream: Raw Cream is cream produced under the same requirements as raw milk, the average bacterial plate count of which shall not exceed 100,000 count c.c. at the time of delivery to the consumer.

[fol. 23] (F) Pasteurized Cream: Pasteurized cream is cream the average bacterial count of which does not exceed 400,000 per c.c. before pasteurization and does not exceed 60,000 per c.c. after pasteurization and until delivery to the consumer. It shall come from farms meeting the requirements for pasteurized milk and it shall be pasteurized at plants conforming to the requirements of this ordinance.

(G) Buttermilk and Skimmed Milk: (1) Skimmed milk is milk from which substantially all the milk fat has been removed.

(2) Buttermilk is the product which remains when milk fat is removed from milk or cream, sweet or sour, in the process of churning and contains not less than 8½% of solids.

(3) Buttermilk (natural or cultured) and skimmed milk sold or distributed in Beloit for individual and family consumption shall be produced from milk conforming with the requirements for raw milk, if made from raw milk, or pasteurized milk, if pasteurized. Buttermilk and skimmed milk shall be sold or distributed only in clean and sanitary containers.

(H) Milk Products: Milk products shall be taken to mean any product made from milk or cream. Milk products shall be produced and kept in a clean and sanitary manner. Milk, cream, buttermilk, or skimmed milk entering into the composition of soft drinks or other unheated mixtures, sold or distributed or offered for sale in Beloit shall conform to the requirements for raw or pasteurized milk, cream, buttermilk or skimmed milk intended for individual or family consumption.

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(I) Bulk Milk: Bulk milk, bulk cream, bulk buttermilk and bulk skimmed milk, of a quality permitted by the State Department of Agriculture, properly cooled, may be sold or distributed in properly sterilized containers for cooking and manufacturing purposes, but not for drinking purposes.

(J) Goat Milk: Goat milk is the lacteal secretion, free from col-strum, obtained by the complete milking of healthy [fol. 24] goats, and shall comply with all the requirements of this section. The word "cows" shall be interpreted to include goats.

(K) Other Requirements: (1) Stores, restaurants and all other eating places receiving milk, cream, buttermilk, skimmed milk, milk products for resale and distribution shall keep such products properly cooled or iced and in a sanitary manner, until such time as they are sold or distributed, and such products shall only be sold or distributed while in a clean and fresh condition. Milk and cream to be sold in original containers only.

(2) No milk producer or distributor shall transfer milk or milk products from one container to another upon the street or in any vehicle or store, in any place except a bottling or milk room permitted by the Health Officer.

(3) No milk distributor or producer shall purchase or obtain milk, cream, skimmed milk or buttermilk from any person, firm, or corporation whose name and address is not furnished by the Health Officer, prior to the time of obtaining such milk or cream. Consent must be obtained from the Health Officer before such milk, cream, buttermilk or skimmed milk is obtained.

(4) All vehicles in the City of Beloit used in the delivery of milk shall be so constructed as to protect the milk from the sun and from contamination.

(L) Milk Producer: A milk producer is any person who owns or controls one or more cows a part of or all the milk products from which is sold and delivered to another person.

(M) Milk Distributor: A milk distributor is any person who has in his possession, offers for sale, sells or delivers to another any milk or milk products for consumption to the final consumer.

(N) Dairy or Dairy Farm: A dairy or dairy farm is any place or premises where one or more cows are kept, a part or all of the milk or milk products from which is sold and delivered to any person other than the immediate family.

[fol. 25] (O) Milk Plant: A milk plant is any place or premises, or establishment where milk or milk products are processed, stored, bottled, pasteurized, or prepared for sale or distribution.

(P) Health Officer: The term "Health Officer" shall mean the health authority of the city of Beloit or his authorized representative.

(Q) Disinfectant: A disinfectant shall be taken to mean any germicidal substance approved by the Health Officer.

(R) Person: Wherever the word "person" has been used in the Section, it shall be deemed to include any person, persons, firm, association, company, or corporation.

(S) Sell, Offer or Deliver for Sale or Exchange: For the purposes of this Chapter the words "sell, offer, deliver for sale or exchange" or their equivalents, shall include the serving of milk or its fluid derivatives for compensation at all places where meals or lunches are served. All milk served for beverage purposes in restaurants etc. shall be served only in the original bottles; provided these requirements shall not apply to milk used in mixed beverages.

(T) Bottling and Capping: All raw and pasteurized milk as defined in this section sold to stores, restaurants and other eating places and delivered to the family trade shall be bottled and capped, using standard milk bottles or single service containers. The bottles shall be cleaned and efficiently sterilized prior to filling and the filling shall be accomplished with clean and sanitary apparatus in such manner as to prevent any part of the person or clothing from coming in contact. Capping shall be done by mechanical cappers or machinery kept in clean and sanitary condition. Caps shall be purchased in sanitary tubes and stored and handled in such a way as not to contaminate the milk or cream. Single service containers shall be purchased and stored only in sanitary cartons and shall be kept clean in a dry place and shall be filled and handled in such a manner as to permit of no contamination. The sterilization of

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bottles and filling and capping shall be performed within the [fol. 26] pasteurization plant or in the milk house where raw milk is prepared except that by consent of the Health Officer, storing and capping of bottles may be performed in a milk house, or room situated elsewhere and fulfilling all the conditions required of the milk house described under the caption, raw milk. Where such consent is given, the milk and cream shall be transported in covered containers, unexposed to the sun, and shall be cooled in conformance with this ordinance.

(U) Labeling: All bottles, cans, packages and other containers inclosing milk or cream, buttermilk, or skimmed milk shall be permanently labeled and marked with the name of the contents, the word "Pasteurized" if the contents have been pasteurized and the word "Raw" if the contents are raw, and the name of the producer or distributor. The label or marks shall be letters of a size and kind approved by the Health Officer and shall contain no marks or words not approved by the Health Officer.

(V) Bacterial Count and Other Tests: (1) as used herein, the term "average bacterial plate count" shall mean the logarithmic average, and the "average reduction time" shall mean the arithmetic average, of the respective results of such tests on the last four consecutive samples, taken by the milk inspector at such time and place as he sees fit. All stores, cafes, restaurants, soda fountains and milk vendors shall furnish the milk inspector with such samples upon his request, and he shall make payment if demanded.

(2) Bacterial counts and reduction tests shall be made according to the latest standard methods recommended by the American Public Health Association. Other chemical and physical tests for the determination of adulteration shall be made according to the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists.

(W) Special Grades: (1) Certified milk is milk which conforms with the current requirements of the American Association of Medical Milk Commissions.

[fol. 27] (2) Raw milk as defined in this ordinance is essentially Wisconsin Grade A Raw Milk.

Under the supervision and consent of the Wisconsin Department of Agriculture, raw milk with such modifications

in production as that Department desire- may be termed and labeled Wisconsin Grade A Raw Milk.

(3) Pasteurized milk may, with the consent of the Wisconsin Department of Agriculture, and under regulations specified by them, be termed and labeled Wisconsin Grade A Pasteurized Milk.

(X) General Provisions: (1) No milk or cream shall be sold, distributed, offered for sale or delivered within the city of Beloit which is not either Beloit Grade "A" raw milk, pasteurized milk, or special grades.

(2) No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and E. Grand Ave., in the City of Beloit.

(3) Milk to be consumed in the form of whole milk shall be delivered to the final consumer within 48 hours of the time of pasteurization.

(4) Milk sold or kept for sale or use within the City of Beloit shall not contain more foreign matter than shall leave a perceptible amount of sediment or stain other than that of natural butter fat when a pint sample thereof is filtered through a pledget of cotton one inch in diameter. Such milk shall be entirely free from disease-producing bacteria and likewise free from blood or pus or things dangerous or detrimental to health.

(5) No person shall within the city of Beloit produce, sell, offer or expose for sale or have in possession with intent to sell any milk or milk product which is adulterated or misbranded.

(6) The Health Officer or any officially appointed representative he may so designate shall inspect periodically or at such time as convenient or which expediency may require, every dairy farm producing milk and cream for consumption within the city of Beloit and all milk plants whose milk and cream are intended for consumption within the city of Beloit.

[fols. 28-29] (7) Samples of milk and cream from dairies, milk depots, stores, cafes, soda-fountains, restaurants and other places where milk products are sold shall be tested as often as the Health Officer may require. Bacteria counts

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and other tests shall be made in conformity with the standard methods recommended by the American Public Health Association and the Association of Official Agricultural Chemists. Tests may include such other chemical and physical determinations as the Health Officer may deem necessary for making macterial counts and the detection of adulteration. Notices of bacterial counts shall be given to the producer or distributor concerned as soon as made. Samples may be taken by the Health Officer at any time prior to the final delivery to consumer of any milk or milk products. All dairies, milk plants, milk depots, stores, cafes, restaurants, soda-fountains and other places which shall sell or offer for sale milk or milk products in the city of Beloit shall furnish the Health Officer, upon his request, the names and address of source from which their milk supply is obtained.

(8) The delivery of milk and cream to and the collection of milk containers from quarantined residences, or where the Health Officer directs, shall be subject to special requirements.

(Y) Revocation of License: A license may be suspended or revoked by the Health Officer upon the violation of the holder thereof of any of the terms of this section, or, when in the judgment of the Health Officer, the milk supply in question has become a public health menace, and provided the holder of such license shall have the right of appeal to the City Council.

(Z) Penalty: Any person who shall violate any provision of this section may be subject to a fine of not more than One Hundred Dollars or by a jail sentence not to exceed 60 days.

[fol. 30] Caption omitted.

[fol. 31] In Circuit Court of Rock County

[Title omitted]

Notice of Appeal to Supreme Court—Filed January 18, 1947

Please Take Notice that Lawrence Dyer hereby appeals to the Supreme Court of the State of Wisconsin from the Judgment of the Circuit Court for Rock County, Wisconsin, dated December 20, 1946, which dismissed his petition and rendered costs against him in the amount of One Hundred Six and 90/100 Dollars ($106.90) and from the whole of said Judgment.

Dated December 31, 1946.

McGowan, Geffs, Geffs & Block, Attorneys for Petitioner, Lawrence Dyer.

To C. L. Haugan and Arnold, Caskey and Robson, Attorneys for the Defendant; Katherine Garman, Clerk of Circuit Court, Janesville, Wisconsin.

[File endorsement omitted.]

[fol. 32] Bond on appeal for $250.00 approved and filed Jan. 18, 1947, omitted in printing.

[fol. 33] [Endorsed:] Due service of within Notice of Appeal and appeal bond admitted this 4th day of January, A. D., 1946. C. L. Haugan, Arnold, Caskey & Robson, Attorneys for Defendants. Original. Due service admitted this Jan. 7, 1947. Katherine Carman, Clerk Circuit Court, Rock Co., Wis.

[File endorsement omitted.]

[fol. 34] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MINUTE ENTRY—May 13, 1947

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Eli Block, Esq., and George S. Geffs, Esq., for the said appellant, and submitted on brief for the said respondents, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 35-36] IN SUPREME COURT OF WISCONSIN

Rock Circuit Court—Opinion by Justice Barlow.

LAWRENCE DYER, Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin, R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin, and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, Respondents.

JUDGMENT—June 10, 1947

This cause came on to be heard on appeal from the judgment of the Circuit Court of Rock County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Rock County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Forty-nine Dollars and Ninety Cents ($49.90).

[fol. 37] IN SUPREME COURT OF WISCONSIN

[File endorsement omitted]

LAWRENCE DYER, Appellant,

v.

CITY COUNCIL OF THE CITY OF BELOIT, ET AL., Respondents.

Appeal from a Judgment of the Circuit Court for Rock County. Jesse Earle, Circuit Judge. Affirmed

September 11, 1946, Lawrence Dyer, petitioner and appellant, filed a petition praying for a writ of mandamus directing the city council of the city of Beloit, Rock county, Wisconsin, A. D. Telfer, city manager of the city of Beloit, R. H. Calland, city clerk of the city of Beloit, and Stanley J. Goldschmidt, city sanitarian of the city of Beloit, defendants and respondents, to issue to him a license as a milk distributor in the city of Beloit. Case was tried to the court, and judgment entered December 20, 1946, dismissing the petition. Petitioner appeals. The facts will be set forth in the opinion.

OPINION—Filed June 10, 1947

[fol. 38] BARLOW, *J.* The city of Beloit passed an ordinance under its police power regulating the sale and distribution of whole milk for direct human consumption, and the question presented involves the constitutionality of this ordinance. The only provision attacked is sec. 8.09(X)(2) of the general ordinance, which provides:

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the city of Beloit."

It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth Amendment of the constitution of the United States, and is in conflict with the interstate commerce clause of the United States constitution, sec. 8 Art. I.

The material facts, part of which were stipulated, are that Lawrence Dyer, appellant, applied for a license to distribute milk in the city of Beloit under the ordinance, set-

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ting forth in his application for a license that he was going to obtain his milk from a pasteurizing plant of the Dean Milk Company located in Chemung, Illinois, a distance of between twenty-five and thirty miles from the point indicated by the ordinance of the city of Beloit, and truck the same to the city of Beloit. As required by the ordinance he filed with the city clerk a list of farmers who furnished milk to the Dean Milk Company plant, the total number of farms being one hundred and ninety-seven. These farms are located in four counties, three of which are in the state of Illinois and one in the state of Wisconsin. The application was denied under the ordinance. The state line between [fol. 39] Wisconsin and Illinois is the south city limits of the city of Beloit.

That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur. p. 1092, sec. 307. Municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a prima facie presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it.

The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries and creameries. The area described in the ordinance includes pasteurization plants [fol. 40] both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one

hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three-fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to nearby plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him, that the milk produced by the Dean Milk Company complied with the sediment tests, blue tests, other tests and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a much greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel Larson* v. *City of Minneapolis* (1933), 190 Minn. 138, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval [fol. 41] from the trial court:

> ". . . It is obvious that adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed. . . ."

The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered

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that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt.

Counsel for appellant relies on *State ex rel Larson* v. *City of Minneapolis*, supra, and *La Franchi* v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No considera-[fol. 42] tion was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens.

This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not

sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State* v. *Chicago, Milwaukee & St. Paul R. Co.* (1908), 136 Wis. 407, 117 N. W. 686, 19 L.R.A. (N. S.) 326; *Wadhams Oil Co* v. *Tracy* (1909), 141 Wis. 150, 123 N. W. 785.

It is argued that secs. 97.31 – 97.37, Stats. prohibit the sale of milk from unhealthy cows, insanitary barns and [fol. 43] utensils, and the sale of insanitary and adulterated milk, and authorize the state department of agriculture to inspect the premises, plants and facilities of transportation and fix the requirements of pasteurization. The department of agriculture assumes responsibility for milk complying with the statutes used in manufacturing, this being known to the public as "Grade B milk," but it leaves to the municipalities the regulation of milk furnished for direct human consumption, known to the public generally as "Grade A milk," except as the department of agriculture assists the municipalities and cooperates with them in requiring dealers to sell clean, wholesome milk produced under sanitary conditions that comply with the state law and local ordinances that may be lawfully passed. This cannot be said to burden interstate commerce in any way.

It is considered that the ordinance is a reasonable exercise of the police power of the city of Beloit.

By the Court.—Judgment affirmed.

[fol. 44] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN TO THE SUPREME COURT OF THE UNITED STATES—Filed July 17, 1947

To Honorable Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin:

Lawrence Dyer, your petitioner, respectfully shows:

1. Petitioner is the appellant in the above entitled cause.

2. The above named appellant filed a petition for mandamus in the Circuit Court of Rock County, of the State of Wisconsin on the 11th day of September, 1946 to compel the City of Beloit, Wisconsin, to issue to him a milk dis-

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tributor's license, and judgment was entered therein in favor of the appellees.

3. An appeal from said judgment to the Supreme Court of the State of Wisconsin was affirmed by said Supreme Court on the 10th day of June, 1947, and said judgment has become and is a final judgment.

4. In said cause there is drawn in question the validity of a city ordinance of the City of Beloit, Rock County, Wisconsin, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity; that said ordinance provides:

> [fols. 45-46] "No pasteurized milk shall be sold in the City of Beloit, which shall not have been pasteurized in approved plants within 6 miles from the intersection of State Street and East Grand Avenue in the City of Beloit";

that it is in violation of Section 8 of Article One of the United States Constitution which provides that the Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes; and said ordinance is in violation of the First Section of the Fourteenth Amendment of the Constitution of the United States in that it denies this petitioner of his property without due process of law and denies to this petitioner the equal protection of the laws.

Wherefore, Petitioner prays for the allowance of an appeal from said Supreme Court of the State of Wisconsin to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Wisconsin may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the clerk of the Supreme Court of the State of Wisconsin may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

Dated: July 14th, 1947.

Claude D. Stout, Milton, Wisconsin, Attorney for petitioner and Proposed Appellant.

George S. Geffs, Eli Block and Jacob Geffs of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

[fol. 47] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 17, 1947

The said Lawrence Dyer assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of the State of Wisconsin erred in holding and deciding that Sec. 8.09 (X) (2) of the Beloit City Ordinance which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit.",

did not deprive appellant of his property rights without due process of law, did not deprive appellant of his right of contract, and did not deny to appellant the equal protection of the laws within the meaning of section 1 of article XIV of the Amendments to the Constitution of the United States.

2. The Supreme Court of the State of Wisconsin erred in holding and deciding that said city ordinance as applied to appellant did not violate section 8, article I of the Constitution of the United States, being what is commonly called the Interstate Commerce clause of the United States Constitution.

PRAYER FOR REVERSAL

For which errors said Lawrence Dyer, appellant herein, prays that the said decision and judgment of the Supreme [fols. 48-49] Court of the State of Wisconsin, dated June 9, 1947, be reversed and that a judgment be rendered in favor of said appellant herein, and for costs.

Dated at Janesville, Wisconsin, this 14th day of July, 1947.

Claude D. Stout, Attorney for Appellant, Milton, Wisconsin.

George S. Geffs, Jacob Geffs and Eli Block, of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

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[fol. 50] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF UNITED STATES—Filed July 30, 1947

The petition of Lawrence Dyer for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin and assignment of errors while therewith and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, as prayed in said petition, and that the clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within 40 days from the date hereof.

It is further ordered that said petitioner shall give good and sufficient security in the sum of $250.00, that said appellant shall prosecute said appeal to effect, and if said appellant fails to make his plea good he shall answer all damages and costs.

The said appellant now presenting a bond in the sum of $250.00 with Standard Accident Insurance Company of Michigan and authorized to do business in Wisconsin as surety.

It is ordered that the same be and is hereby approved.

The appeal shall operate as a supersede-s.

Chester A. Fowler, Acting Chief Justice of the Supreme Court of Wisconsin. (Seal)

Dated: July 30, 1947.

[fols. 51-54] [File endorsement omitted.]

[fols. 55-56] Bond on appeal for $250.00, filed July 17, 1947, omitted in printing.

[fols. 57-80] Citation in usual form showing service on E. J. Caskey, et al., filed July 17, 1947, omitted in printing.

[File endorsement omitted.]

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed July 25, 1947

To the Clerk of the Supreme Court of Wisconsin:

Please prepare a transcript of the record in the above entitled cause in the matter of appeal therein to the Supreme Court of the United States and include in said transcript the following:

1. Petition for mandamus
2. Appellees answer
3. Decision and order denying writ of mandamus
4. Judgment of Circuit Court denying petition
5. Notice of appeal to Supreme Court
6. Appeal bond
7. The attached notice of testimony and Beloit City Ordinance in lieu of bill of exceptions
8. Appeal to the Supreme Court, Appeal bond, argument before Supreme Court, and opinion of Supreme Court
9. Judgment of the Supreme Court of Wisconsin
10. Petition for appeal to Supreme Court of the United States
11. Assignment of Errors
12. Order Allowing Appeal
13. Notice of Service on Appellees
14. Appeal Bond on Appeal to the Supreme Court of the United States
15. Citation of Appeal

[fols. 82-83] 16. Statement as to Jurisdiction

17. Praecipe

Claude D. Stout, Milton, Wisconsin, Attorney for Appellant; George S. Geffs, Jacob Geffs, Eli Block of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

Dated: 18th day of July, 1947.

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Service of the foregoing praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged, this the 31st day of July, 1947. And it is hereby agreed that the matter set forth in said praecipe shall constitute the entire transcript of the record in this appeal; and that the stipulation of testimony and Exhibit may be substituted for the Bill of Exceptions.

C. L. Haugan, Earl J. Caskey, of the firm of Arnold, Caskey and Robson, all of Beloit, Wisconsin, Attorneys for Appellees.

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] In Supreme Court of the United States

[Title omitted]

Statement of Points to Be Relied Upon and Designation of Record—Filed September 2, 1947

Comes now Appellant, Lawrence Dyer, plaintiff above named, and states that his appeal is from the whole of the final judgment given, made and entered in the above entitled cause on the Tenth (10th) day of June, 1947, and that said appellant will rely on his appeal herein on the following points:

I

That the Supreme Court of the State of Wisconsin erred in finding that the Ordinance of the City of Beloit, Rock County, Wisconsin, which reads,

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

is not a trade barrier and does not violate the right of contract guaranteed under the Fourteenth (14th) Amendment of the Constitution of the United States.

II

That the said Supreme Court of the State of Wisconsin [fols. 86-87] erred in finding that the Ordinance of the City

of Beloit, Rock County, Wisconsin, is not in conflict with Section 8, Art. I of the Constitution of the United States, generally known as the Inter-State Commerce Clause of the Constitution.

III

That the Supreme Court of the State of Wisconsin erred in finding that the Ordinance of the City of Beloit, Rock County, Wisconsin, above quoted, is a reasonable exercise of the Police Power of the City of Beloit, Rock County, Wisconsin.

Appellant states that the whole of the record, as filed, is necessary for the consideration of the case.

Claude D. Stout, Milton, Wisconsin; George S. Geffs, Jacob Geffs, Eli Block, of Counsel, Janesville, Wisconsin.

Due Service and receipt of a copy of the within statement of points admitted this the 30th day of August, 1947.

J. Arthur Moran, Delavan, Wisconsin, Attorney for Appellees; Earl J. Caskey, of the firm of Arnold, Caskey & Robson, Beloit, Wisconsin, of Counsel.

[fol. 88] Supreme Court of the United States

Order Noting Probable Jurisdiction—October 13, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Claude D. Stout. File No. 52,505, Wisconsin, Supreme Court, Term No. 275. Lawrence Dyer, Appellant, vs. City Council of the City of Beloit, Rock County, Wisconsin, et al. Filed August 18, 1947. Term No. 275 O.T. 1947.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of the case the statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	3
Dates of judgments and appeals	3
Manner in which Federal question was raised	4
The Federal questions involved are substantial	5
Appendix "A"—Opinion of the Circuit Court of Rock County	12
Appendix "B"—Opinion of the Supreme Court of the State of Wisconsin	15

Table of Cases Cited

Brimmer v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862	8
Carter v. *Commonwealth of Virginia*, 321 U. S. 131, 64 Sup. Ct. 464	8
Freeman v. *Hewit* (U. S.), 67 Sup. Ct. 274, 276	7
Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283	11
John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100, 48 Sup. Ct. 489, 72 L. Ed. 801	3
LaFranchi v. *City of Santa Rosa* (Cal.), 65 P. (2d) 130	11
McLeod v. *J. E. Dilworth Co.*, 322 U. S. 313, 34 L. Ed. 455	8
Meridian v. *Sippy* (Cal. App.), 128 Pac. (2d) 884, 888	5, 11
Prescott v. *City of Borger* (Tex.), 158 S. W. (2d) 578	11
Sheffield Farms Co., Inc. v. *Seaman* (N. J.), 177 A. 372	10
Southern Pac. Co. v. *State of Arizona*, 325 U. S. 761, 769, 65 S. C. 1515, 1520	8
State ex rel. Larson v. *City of Minneapolis* (Minn.), 251 N. W. 121	11

Page

State of Minnesota v. *Barber*, 136 U. S. 313, 34 L. Ed. 455 ..... 8, 10
Wolfrom v. *Anderson*, 249 Wis. 433, 25 N. W. (2d) 880 9

STATUTES CITED

Constitution of the United States:
Section 8 of Article 1 ..... 3, 5
Fourteenth Amendment 3
Judicial Code of United States, Sec. 344(a) 1, 11
Ordinances of City of Beloit:
Sec. 8.09 (X) (2) 2, 3, 5
Sec. 8.09 (X) (6) 9

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; R. H. CALLAND AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN,

Appellees

STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

I, Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U.S.C.A. 344(a)), from a final judgment of the Supreme Court of Wisconsin entered the 9th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment

or decree in a suit in the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal." The facts from which the case arises may be briefly stated as follows:

On August 29, 1946, Lawrence Dyer, the appellant, applied for a license to sell pasteurized milk in the City of Beloit, Wisconsin (R. 12). In his application he stated that he would obtain the milk from the Dean Milk Company at Chemung, Illinois (R.12-13).

Chemung, Illinois, is a distance of 25 to 30 miles from the City of Beloit (R.12).

The milk from the Dean pasteurization plant is sold in the City of Chicago, Illinois, and surrounding suburbs of Chicago, Illinois (R.14). These cities require inspection of the farms where the milk is produced, of the pasteurization plant and the facilities of transportation. The suburban cities of Chicago, Illinois, operate under what is known as the Model Milk Ordinance formulated by the Public Health Service of the United States. These regulations in regard to sanitation, quality and wholesomeness of the milk, are as stringent as the requirements of the Beloit Ordinance. In addition, the Dean Milk Company have inspectors of their own that make periodical inspections of the farms where the milk is produced, of the pasteurization plant and the facilities of transportation (R.14).

On August 30, 1946 the City of Beloit denied appellant's application for license to sell milk in the City of Beloit on the sole ground that he had not complied with Section 8.09 (X) (2) of its ordinances, which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

proved plants within six miles from the intersection of State Street and East Grand Ave. in the City of Beloit." (R.13)

Appellant brought mandamus in the Circuit Court of Rock County to compel the city to issue him a license, alleging that the above provision of the Beloit City Ordinance deprived him of his property and right to make a livelihood without due process of law and constituted an illegal interference with interstate commerce (R.2). The trial court held the above provision did not violate the Constitution of the United States and dismissed the appellant's petition for mandamus (R.7-10).

On appeal the Supreme Court of the State of Wisconsin on June 9, 1947, entered judgment affirming the decision of the lower court.

II. State Statute, the Validity of Which Is Involved

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (X) (2) of the Beloit City Ordinances which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

The city ordinance is a statute within the meaning of section 237(a) of the Judicial Code, for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.* (277 U. S. 100) (48 S. Ct. 489), 72, L. Ed. 801.

III. Dates of Judgment and Appeal

The final judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Rock County,

Wisconsin, dismissing appellant's petition and holding the above quoted provision of the City ordinance valid was entered on June 10, 1947. *Dyer* v. *City Council of City of Beloit, et al.*, 27 N. W. 2d 733.

Petition for appeal to this court was presented to the Honorable Chester A. Fowler, Acting Chief Justice of the Supreme Court of Wisconsin on July 30, 1947 and was by him allowed the same day.

IV. Manner in Which Federal Question Was Raised

The Federal questions in this case were raised at the outset and urged throughout all the proceedings in the state courts. The action was started by filing a petition for mandamus in the Circuit Court for Rock County, Wisconsin. This petition alleged among other things that the City of Beloit denied the appellant the right to sell pasteurized milk within the City of Beloit on the sole ground that the pasteurization plant where appellant obtained his milk was not located within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit, and that the action of the city in refusing to grant the appellant a license was arbitrary and unreasonable; that the above quoted provision of the city ordinance was unconstitutional, deprived the appellant of his property and a right to make a livelihood without due process of law and constituted an illegal interference with interstate commerce (R.1-3).

In its opinion the trial court stated:

> "The petitioner brings this mandamus proceeding to compel the issuance of a license, claiming that the City of Beloit unreasonably and arbitrarily refused to grant the license and that such refusal deprived him of his property rights and of constitutional rights without due process of law, and is an illegal interference with interstate commerce" (R.8).

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The opinion of the Supreme Court of Wisconsin appended to this statement affirmatively shows that the Federal questions were presented to, considered and decided by it.

> "BARLOW, J. The city of Beloit passed an ordinance under its police power regulating the sale and distribution of whole milk for direct human consumption, and the question presented involves the constitutionality of this ordinance. The only provision attacked is sec. 8.09 (X) (2) of the general ordinance, which provides:
>
> 'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit.'
>
> It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth Amendment of the constitution of the United States, and is in conflict with the Interstate Commerce Clause of the United States Constitution, sec. 8, art. 1" (R.25).

V. Question Involved Is Substantial

This is the first time in the judicial history of this county that a state or federal court of last resort has declared that the production and sale of any wholesome food within its territorial limits may be arbitrarily restricted to that produced and processed in such surrounding territory as it deems capable of producing and processing the necessary amount to supply its population.

This doctrine is stated in the following portions of the opinion:

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, *where the court said*

that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt. (Italics ours.)

Counsel for appellant relies on *State ex rel. Larson v. City of Minneapolis*, supra, and *La Francei v. City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens. (Italics ours.)

This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State v. Chicago, Milwaukee & St. Paul R.*

Co. (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co. v. Tracy* (1909), 141 Wis. 150, 123 N. W. 785."

This decision is contrary to the latest pronouncements of this Court upon the meaning and purpose of the Interstate Commerce Clause of the Constitution of the United States.

This Court stated in *Freeman* v. *Hewit*, — U. S. —, 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. Southern Pacific Co. *v.* Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; Morgan *v.* Virginia, 328 U. S. —, 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the Morgan case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.
>
> These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable be-

cause it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

In *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep.:

> "That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution pro tonto of absolute state sovereignty over the same subject."

In *Southern Pac. Co.* v. *State of Arizona*, 325 U. S. 761, 769, 65 S. Ct. 1515, 1520, this Court stated:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

In *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330, 64 S. Ct. 1023, 1026 this Court stated:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States."

In the case at bar Beloit drew a circle around itself with a radius of six miles from the center of the City and absolutely prohibited all commerce originating beyond the rim of the circle. It is true Beloit is on the State line between Wisconsin and Illinois and part of the circle lies within the State of Illinois. But that fact, plus the fact that Congress has not passed regulatory legislation, does not save this ordinance from the Commerce Clause. *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862. In the later case a stat-

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ute prescribing a 100 mile radius within which animals should be inspected before slaughter was held invalid.

The Beloit ordinance is in violation of the due process clause of the Fourteenth Amendment. The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Beloit could make arrangement to inspect enough of the surrounding territory to supply it with milk and prohibit entry of milk originating beyond the artificial line prescribed by the ordinance.

The line was drawn without reasonable relation to the supposed object to be obtained by the city. The chief health officer of the city testified that with its present staff he would be unable to inspect the milk plant where the plaintiff proposed to obtain his milk and the additional farms from which the milk came, even though the plant and farms were located within the 6 mile zone (R. 16-17).

The trial court stated in its opinion which under the Wisconsin law is equivalent to a formal finding of fact—*Wolfrom* v. *Anderson*, 249 Wis. 433, 25 N. W. (2d) 880, as follows:

> "No objection is raised by the city as to the grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinances, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than 6 miles from the City of Beloit, i. e., a distance of between 25 and 35 miles from the point indicated from Beloit City Ordinance" (R. 8).

The Beloit City Ordinance also provided:

> "(X) (6) The Health Officer or any officially appointed representative he may so designate shall inspect periodically or at such time as convenient or which expediency may require, every dairy farm producing milk and cream for consumption within the City of Beloit and all milk plants whose milk and cream are

intended for consumption with- the City of Beloit" (R. 27).

The philosophy of the opinions of both the trial and Supreme Court of Wisconsin is that the city under the due process clause may deal with as many milk dealers as the city deems necessary to supply the local population with milk and refuse license to all others and that such an ordinance is not in violation of the due process clause if enacted in "good faith."

In *State of Minnesota* v. *Barker*, 136 U. S. 313, 34 L. Ed. 455, this Court stated:

> "The presumption that this Statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void."

The Supreme Court of New Jersey—*Sheffield Farms Co., Inc.* v. *Seaman* (N. J.), 177 A. 372, held such an ordinance to be unconstitutional, stating:

> "The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

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The following cases have held that an ordinance requiring the pasteurization plant to be located within the city limits is unconstitutional: *State ex rel. Larson* v. *City of Minneapolis* (Minn.), 251 N. W. 121, *LaFranchi* v. *City of Santa Rosa* (Cal.) 65 P (2d) 1301.

The following cases held city ordinances which prescribed that the pasteurization plant should be located within the boundaries of the county in which the city was located invalid as a violation of due process: *Meridian* v. *Sippy* (Cal. App.) 128 Pac. (2d) 884 at page 888 stated.

> "Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, and *Prescott* v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578.

There are no decisions of any court of last resort in this country that sustained the validity of a similar ordinance.

VI. It is, therefore, respectfully submitted that this court has jurisdiction of this appeal under section 237 (a) of the Judicial Code, as amended.

The opinion of the trial court is attached hereto and marked Appendix A and the opinion of the Supreme Court of Wisconsin is also attached and marked Appendix B.

CLAUDE D. STOUT,
Milton, Wisconsin,
Attorney for Appellant.

GEORGE S. GEFFS, JACOB GEFFS,
ELI BLOCK of MCGOWAN, GEFFS,
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Janesville, Wisconsin,
Of Counsel.

APPENDIX A

STATE OF WISCONSIN, CIRCUIT COURT, ROCK COUNTY

LAWRENCE DYER, *Petitioner*,

v.

CITY COUNCIL of the City of BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin, *Defendants*

DECISION AND ORDER DENYING WRIT

This action arises out of the refusal of the Common Council of the City of Beloit to grant a license to the Petitioner to sell and distribute pasteurized milk within the City of Beloit.

The milk which the Petitioner proposed to sell and deliver in the City of Beloit, would be pasteurized at the Dean Milk Company plant located at Chemung, Illinois, some twenty-five to thirty-five miles distant from said City of Beloit.

Section 8.09 X (2) of the General Ordinances of the City of Beloit, provides that:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Avenue, in the City of Beloit."

The Petitioner's application for a license was filed on August 29, 1946, and was rejected at a regular Council meeting held on August 30, 1946, for the reason that the pasteurization plant of the Dean Milk Company was located more than six miles from the intersection of the two above named streets in the City of Beloit, and that proper inspec-

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tion would require unreasonable additional expense to the City of Beloit.

The Petitioner brings this mandamus proceeding to compel the issuance of the license, claiming that the City of Beloit unreasonably and arbitrarily refused to grant the license, and that such refusal deprives him of his property rights and of constitutional rights without due process of law, and is an illegal interference with interstate commerce.

No objection is raised by the City as to the Grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit; i.e., a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance.

A stipulation of facts was entered into between Council respectively, and some testimony taken upon the hearing. The only issue involved is as to whether or not the six mile provision of the Beloit Ordinance constitutes an unreasonable interference with the rights of the petitioner.

It is well recognized throughout this country, and some other countries, that milk is a valuable and universal food product; that it is peculiarly liable and subject to contamination and adulteration; that the business of producing and distributing milk is one which, when improperly conducted or carelessly handled, may seriously affect the public health; that in the interest of public health and safety the regulation of the production and distribution of milk is within the police power of the sovereignty; and that strict regulatory provisions may be enacted and enforced to guarantee to the consumer that protection which the sovereignty owes to him.

It is now a universal requirement and practice that milk shall be inspected at its source of supply, in order to determine, not only its proper grade, but whether the conditions surrounding its production are sufficiently sanitary, etc. Qualified inspectors are therefore appointed or hired by municipalities to make periodical inspections.

The petitioner herein has made no offer to assume or repay the additional expense necessary to have such additional inspections made. The cases cited by petitioner's counsel, where ordinances similar to the Beloit Ordinance have been held invalid, are cases where the milk concerned was produced in a territory where inspections were already being made by regular inspectors of the particular municipality involved, and would incur no particular additional expense to the City.

Zoning ordinances are valid if reasonable and not intended as a trade barrier. They must also be reasonable and not arbitrary, capricious or discriminating. I am aware that the mere fact that a City already has a sufficient number of milk dealers, or has an adequate supply of milk, would present no valid reason for the refusal of a license to sell milk in the City, as that would then be an unfair and illegal interference with property and constitutional rights.

I am therefore of the opinion, that under all the circumstances appearing in this proceeding the Ordinance here involved was not intended as a trade barrier, and is not unreasonable, arbitrary or capricious, and is therefore constitutional and valid.

The petition for a peremptory writ requiring the City of Beloit to Issue a license to the petitioner is therefore ordered denied.

Dated December 7, 1946.

By the Court,
JESSE EARLE,
Circuit Judge.

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APPENDIX B

STATE OF WISCONSIN: IN SUPREME COURT

AUGUST TERM, 1946

No. 184

LAWRENCE DYER, Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, et al., Respondents

Appeal from a Judgment of the Circuit Court for Rock County. Jesse Earle, Circuit Judge. Affirmed

September 11, 1946, Lawrence Dyer, petitioner and appellant, filed a petition praying for a writ of mandamus directing the city council of the city of Beloit, Rock County, Wisconsin, A. D. Telfer, city manager of the city of Beloit, R. H. Calland, city clerk of the City of Beloit, and Stanley J. Goldschmidt, city sanitarian of the city of Beloit, defendants and respondents, to issue to him a license as a milk distributor in the city of Beloit. Case was tried to the court, and judgment entered December 20, 1946, dismissing the petition. Petitioner appeals. The facts will be set forth in the opinion.

BARLOW, *J.:*

The city of Beloit passed an ordinance under its police power regulating the sale and distribution of whole milk for direct human consumption, and the question presented involves the constitutionality of this ordinance. The only provision attacked is sec. 8.09 (X)(2) of the general ordinance, which provides:

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth Amendment of

the constitution of the United States, and is in conflict with the interstate commerce clause of the United States constitution, sec. 8, Art. I.

The material facts, part of which were stipulated, are that Lawrence Dyer, appellant, applied for a license to distribute milk in the city of Beloit under the ordinance, setting forth in his application for a license that he was going to obtain his milk from a pasteurizing plant of the Dean Milk Company located in Chemung, Illinois, a distance of between twenty-five and thirty miles from the point indicated by the ordinance of the city of Beloit, and truck the same to the city of Beloit. As required by the ordinance he filed with the city clerk a list of farmers who furnished milk to the Dean Milk Company plant, the total number of farms being one hundred and ninety-seven. These farms are located in four counties, three of which are in the state of Illinois and one in the state of Wisconsin. The application was denied under the ordinance. The state line between Wisconsin and Illinois is the south city limits of the city of Beloit.

That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 A.M. Jur. p. 1092, sec. 307. Municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a prima facie presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the

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purpose sought to be accomplished and the effect upon all who must comply with it.

The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three-fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to nearby plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him that the milk produced by the Dean Milk Company complied with the sediment tests, blue test, other tests and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a much greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel. Larson v. City of Minneapolis* (1933) 190 Minn. 138, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

> ". . . It is obvious that adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the

question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed. . . ."

The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy,* 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt.

Counsel for appellant relies on *State ex rel Larson v. City of Minneapolis,* supra, and *La Franchi v. City of Santa Rosa,* 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopt-

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ing it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens.

This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State v. Chicago, Milwaukee & St. Paul R. Co.* (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co. v. Tracy* (1909), 141 Wis. 150, 123 N. W. 785.

It is argued that secs. 97.31-97.37, Stats. prohibit the sale of milk from unhealthy cows, insanitary farms and utensils, and the sale of insanitary and adulterated milk, and authorize the state department of agriculture to inspect the premises, plants and facilities of transportation and fix the requirements of pasteurization. The department of agriculture assumes responsibility for milk complying with the statutes used in manufacturing, this being known to the public as "Grade B Milk," but it leaves to the municipalities the regulation of milk furnished for direct human consumption, known to the public generally as "Grade A Milk," except as the department of agriculture assists the municipalities and cooperates with them in requiring dealers to sell clean, wholesome milk produced under sanitary conditions that comply with the state law and local ordinances that may be lawfully passed. This cannot be said to burden interstate commerce in any way.

It is considered that the ordinance is a reasonable exercise of the police power of the City of Beloit.

By the Court.—Judgment affirmed.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

Appeal From the Supreme Court of the State of Wisconsin.

Appellant's Brief

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SUBJECT INDEX.

PAGE

Opinion of the Courts below 1

Statement of Jurisdiction 2

Statement of the case 2

Specification of errors 7

Summary of Argument 8

Argument 11

1. The requirement of the Beloit Ordinance that the pasteurization plant must be located within six miles of State Street and East Grand Avenue in said city prohibits interstate commerce of pure, wholesome and sanitary milk and is therefore unconstitutional 11

The milk which appellant proposed to sell is pure and sanitary and meets the requirement of the Beloit Ordinance as to sanitation 12

A State cannot prohibit interstate commerce on the ground that it is inconvenient or impractical to inspect the original source of the product being offered for sale 12

Including a small part of Illinois within the six mile zone does not meet the requirements of the Interstate Commerce clause as to appellant who obtains his milk beyond the six mile zone 16

Beloit is not free to prohibit interstate commerce in the absence of congressional action 16

Appellant is not responsible for Beloit's inability to inspect the milk being offered for sale..... 19

The milk that appellant offered for sale is being adequately inspected according to current standard and approved methods..... 19

2. The provision of the Beloit Ordinance which prohibits the sale of milk not pasteurized within the six mile zone is arbitrary, discriminatory and in violation of the 14th Amendment of the United States Constitution 27

A city may not draw a line around itself and prohibit the sale of milk originating beyond the line, although it deems that it has included enough territory to supply its local needs..... 27

The six mile zone was drawn without reasonable relation to the supposed object to be obtained by the city 28

Courts of last resort in other states have held such ordinances to be in violation of due process..... 29

Conclusion 35

Appendix:

Model Milk Ordinance..... 37

Opinion of Attorney General of Michigan..... 64

CASES CITED.

Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862..... 18

Carter v. Commonwealth of Virginia, 321 U. S. 131, 64 S. Ct. 464..... 17

Freeman v. Hewit, ... U. S. ..., 67 S. Ct. 274..... 16

Grant v. Leavell, 259 Ky. 263, 82 S. W. (2d) 283..... 34

John P. King Mfg. Co. v. City of Augusta et al., 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801 2

La Franchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301 33

McLeod v. J. E. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023 18

Meridian v. Sippy, 54 Cal. App. (2d) 214, 128 P. (2d) 884 33

Miller v. Williams, 12 Federal Supp. 236 24

Prescott v. City of Borger, (Tex. App.) 158 S. W. (2d) 578 35

Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49 12

Sheffield Farms Co., Inc. v. Seaman 114 N. J. L. 455, 177 A. 372 31

Southern Pac. Co. v. State of Arizona, 325 U. S. 761, 65 S. Ct. 1515 17

State ex rel. Larson v. City of Minneapolis, 190 Minn. 138, 251 N. W. 121 29

State of Minnesota v. Barber, 136 U. S., 313, 34 L. Ed. 455 22

Wolfrom v. Anderson, 249 Wis. 433, 25 N. W. (2d) 880 11

STATUTES.

36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a) 2

TEXTS.

22 Am. Jur. Food Sec. 16 page 817 19

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CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

Appeal From the Supreme Court of the State of Wisconsin.

Appellant's Brief

OPINION OF THE COURTS BELOW.

The opinion of the Supreme Court of the State of Wisconsin (R. 26-30) is reported in 250 Wis. 613, 27 N. W. (2d) 733; the opinion of the Circuit Court for Rock County is not officially reported, but is found in the record at pages 4-6.

STATEMENT OF JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)), from a final judgment of the Supreme Court of Wisconsin entered the 10th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment or decree in a suit in the highest court of a state

> "Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (x) (2) of the Beloit City Ordinances.

A city ordinance is a statute within the meaning of Section 237 (a) of the Judicial Code, for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.* 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 10, 1947, (R. 26-30) and an appeal was allowed by that court to this Court on July 30, 1947.

STATEMENT OF THE CASE.

The case involves the constitutionality of Section 8.09 (x) (2) of the Beloit City Ordinances, which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

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proved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

The parties at the beginning of the trial made the following stipulation of facts:

"It Is Hereby Stipulated, in open court, by Lawrence Dyer, Petitioner, by McGowan, and Geffs, his attorneys, and the defendants by C. L. Haugan, City Attorney for the City of Beloit and Earl J. Caskey, their attorneys; that on the 29th day of August, 1946, the petitioner, Lawrence Dyer, made written application to the City of Beloit for a license to distribute the milk of the Dean Milk Company in the City of Beloit, and that in so doing he has complied with all of the terms of the City Ordinance in Beloit, except in the one respect, that the pasteurization plant of the Dean Milk Compnay is located at Chemung, Illinois, a distance of more than six miles from the corner of East Grand Avenue and State Street in the City of Beloit; that the pasteurization plant of the Dean Milk Company, from which the Petitioner will receive his milk for distribution in Beloit is between twenty-five and thirty miles from the point indicated by the ordinance in the City of Beloit.

"It Is Also Stipulated, that in accordance with the terms of the City Ordinance, the petitioner has filed with the City Clerk a list of the farmers who bring their milk to the Chemung dairy of the Dean Milk Company and that the number of farms so named amounts to one hundred ninety-seven; that such farms are located in the Counties of McHenry, Boone and Winnebago in the State of Illinois, and Walworth County in the State of Wisconsin.

"It Is Further Stipulated, that on the 30th day of August, 1946, the City Council of Beloit rejected the application of the petitioner for such milk license upon the ground that the pasteurization plant of the Dean Milk Company was located more than six miles

from the intersection of the two above named streets in the City of Beloit.

"It Is Further Stipulated, that it is the intention of the petitioner, in the event a license is granted to him, to obtain milk pasteurized at the factory of the Dean Milk Company at Chemung, Illinois, and to truck such milk to the City of Beloit for sale in the City of Beloit at retail stores.

"Dated this 26th day of September, 1946" (R. 8-9).

Appellant Dyer testified that the milk he proposed to sell to retail stores in Beloit was Grade A. milk and its composition qualifies as to the sanitary conditions and quality required by the Beloit City Ordinance (R. 9); that the milk is cooled to 34 degrees when it comes from the pasteurizer and placed in paper cartons; that his truck was insulated and in warm weather he used ice; that when the milk arrived at Beloit, its temperature would not be more than 42 degrees Fahrenheit; that he had occasion to check the bacteria count on this milk with the bacteria count of milk sold in Beloit, and in every instance it was lower than other milk pasteurized and sold in Beloit (R. 9-10); that this milk was sold in the City of Chicago and suburbs; that each farm which supplies milk to the Dean plant is inspected every week and sometimes twice a week by the Chicago Board of Health; that the Dean Milk Company also has its own inspectors who inspect the source of the milk at the farms; that the City of Chicago and its suburbs operate under what is known as the Model Milk Ordinance formulated by the Public Health Service of the United States; (The Model Milk Ordinance is set out in the Appendix of this brief); that the City of Chicago operates under what is known as the Mayor Kelly Milk Ordinance, which is as stringent as the Model Milk Ordinance formulated by the Public Health Service of the

United States (R. 10); that this milk is delivered to the Dean Plant the same day it is produced and would be delivered normally within two hours after being pasteurized (R. 9).

Stanley J. Goldschmidt, the City Sanitarian of Beloit, testified that he and one assistant had charge of inspecting all farms from which Grade A Milk was sold in Beloit; also the inspection of restaurants, clubs, taverns, garbage collection, 1500 people engaged in handling food, quarantine, contagious diseases, and the complaints coming into the department (R. 10-11); *that with his present staff that he could not inspect the Dean Plant and* 150 *additional sources of milk even though the plant and farms were located within six miles of Beloit* (R. 12); that there is more milk coming into Beloit every day than what local people use (R. 11); that there is no objection to the quality or sanitary condition of the milk that Mr. Dyer intends to deliver to the City of Beloit that he knew of and that he had on one or two occasions delivered it to the State Laboratory of Hygiene; that he would say it was about the average of the milk sold in Beloit, not any worse or any better (R. 12).

That his opposition to granting a license to Mr. Dyer was based upon the proposition that the pasteurization plant where he received his milk was located more than six miles from State and Grand Avenue, City of Beloit (R. 12).

That his department did not inspect dairy farms which furnished Grade B milk to Beloit (R. 11) and that farms furnishing Grade A milk were inspected twice a year (R. 12); that if this license was granted the city would have to hire another inspector (R. 12) which would cost the city $200.00 a month and traveling expenses (R. 13), but that

it would be hard to say whether the additional inspector would devote his time to inspecting additional farms without first laying out a program (R. 13).

The Milk Ordinance of the City of Beloit is set forth in the Record pages 13-23. The Ordinance makes no requirement in regard to the proximity of the sources of the milk, or dairy farms, to the City of Beloit. As to the inspection of the original sources and milk plants, the Ordinance provides:

> "(X) (6) The Health Officer or any officially appointed representative *he may so designate* shall inspect periodically *or at such time as convenient or which expediency may require*, every dairy farm producing milk and cream for consumption within the City of Beloit and all milk plants whose milk and cream are intended for consumption within the City of Beloit" (R. 22).
>
> "(X) (7) Samples of milk and cream from dairies, milk depots, stores, cafes, soda-fountains, restaurants and other places where milk products are sold shall be tested as often as the Health Officer may require. Bacteria counts and other tests shall be made in conformity with the standard methods recommended by the American Public Health Association and the Association of Official Agricultural Chemists. Tests may include such other chemical and physical determinations as the Health Officer may deem necessary for making bacterial counts and the detection of adulteration. Notices of bacterial counts shall be given to the producer or distributor concerned as soon as made. Samples may be taken by the Health Officer at any time prior to the final delivery to consumer of any milk or milk products. All dairies, milk plants, milk depots, stores, cafes, restaurants, soda-fountains and other places which shall sell or offer for sale milk or milk products in the city of Beloit shall furnish the Health Officer,

upon his request, the names and addresses of source from which their milk supply is obtained" (R. 22-23).

The Ordinance makes the following requirement *in regard to the location* of the pasteurization plant:

"(X) (2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit" (R. 22).

The trial court in its opinion stated:

"No objection is raised by the City as to the Grade or quality of the milk sought to be sold, *and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance*, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit, *i. e.*, a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance" (R. 5).

The trial Court ruled that the six mile requirement of the Ordinance did not deprive the appellant of his property rights and constitutional rights without due process of law, and was not an illegal interference with Interstate Commerce (R. 6).

The decision of the trial court was affirmed by the Supreme Court of the State of Wisconsin (R. 25).

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Wisconsin erred in holding and deciding that Sec. 8.09 (X) (2) of the Beloit City Ordinance which reads:

"No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

> proved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit.",

did not deprive appellant of his property rights without due process of law, did not deprive appellant of his right of contract, and did not deny to appellant the equal protection of the laws within the meaning of section 1 of article XIV of the Amendments to the Constitution of the United States.

2. The Supreme Court of the State of Wisconsin erred in holding and deciding that said city ordinance as applied to appellant did not violate section 8, article I of the Constitution of the United States, being what is commonly called the Interstate Commerce clause of the United States Constitution.

SUMMARY OF ARGUMENT.

1. The requirement of the Beloit Ordinance that the pasteurization plant must be located within six miles of State Street and East Grand Avenue in said city prohibits interstate commerce of pure, wholesome and sanitary milk and is therefore unconstitutional.

It is conceded that appellant's milk meets all the requirements of the Beloit Milk Ordinance except it was pasteurized in a plant 25 to 35 miles from Beloit. A city or state may enact reasonable inspection laws to insure the purity of food being offered for sale within its boundaries, but a city or state may not prohibit interstate commerce in such commodities altogether even though the inspection is burdensome, and inspection at the original

source impossible from a practical standpoint. The contention that inspection of appellant's milk would cause undue hardship upon the city of Beloit because the pasteurization plant is located 25 to 35 miles from Beloit is without merit because the city's chief health officer testified that his department would be unable to inspect the additional farms and plant even if they were located within the six mile zone, and it would be a minor matter for the chief health officer to satisfy himself whether or not the inspection now being made is adequate. Inspection of appellant's sources of milk, the milk plant and transportation facilities would not be burdensome as a matter of fact.

The fact that the six mile zone covers a small portion of the State of Illinois does not make the Beloit Ordinance less objectionable as to commerce originating in Illinois more than six miles from the City of Beloit.

The City of Beloit is not at liberty to prohibit interstate commerce in the absence of congressional action. The interstate commerce clause is a grant of power to Congress to control commerce, and is a diminution *pro tanto* of absolute state sovereignty over the same subject. The very purpose of the Commerce Clause was to create an area of free trade among the several states.

2. The provision of the Beloit Ordinance which prohibits the sale of milk not pasteurized within the six mile zone is arbitrary, discriminatory, and in violation of the Fourteenth Amendment of the United States Constitution.

A city ordinance which arbitrarily draws a line around the city and prohibits the sale of milk pasteurized beyond the line under any and all circumstances and conditions

is arbitrary and discriminatory. Erection of a prohibitive trade barrier by a city deprives those who are prevented from competing in the city markets of their property and right of contract without due process of law and denies to them the equal protection of the law.

All courts of last resort in this country except the case at bar has held similar ordinances in violation of the Fourteenth Amendment. In some of the cases the burden of inspection was much more onerous than in the case at bar.

Appellant should not be denied relief because he did not offer to bear the expenses of inspection, because (1) he was denied a license on the sole ground that the pasteurization plant from which he proposed to obtain milk was located more than six miles from the City of Beloit, (2) Appellant tendered all the license fees provided for in the Ordinance and (3) Appellant has no control over staffing and regulating the Health Department of the City of Beloit.

ARGUMENT.

I.

The requirement of the Beloit Ordinance that the pasteurization plant must be located within six miles of State Street and East Grand Avenue in said city prohibits interstate commerce of pure, wholesome and sanitary milk and is therefore unconstitutional.

The trial Court stated in its opinion:

> "No objection is raised by the City as to the Grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit; *i. e.*, a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance." (R. 5).

This statement in the trial Court's opinion under the Wisconsin law is equivalent to the formal Finding of Fact, *Wolfrom* v. *Anderson*, 249 Wis. 433, 25 N. W. 2d 880.

The parties stipulated in open court that the appellant had

> "Complied with all of the terms of the City Ordinance in Beloit, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the corner of East Grand Avenue and State Street in the City of Beloit" (R. 8).

The Beloit Ordinance makes no requirement as to the location of the farms where the milk is produced.

It is true that Beloit is located on the state line between Wisconsin and Illinois and that the circle with the six mile radius from East Grand Avenue and State Street includes a small portion of the State of Illinois. The six mile zone prescribed by the Beloit Ordinance prohibits the Appellant from selling pasteurized milk within the city for the sole reason that the milk was pasteurized at a plant twenty-five to thirty-five miles away from Beloit.

Both the trial court and the Supreme Court of the State of Wisconsin held that the provision for the six mile zone was a valid provision notwithstanding the Interstate Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. It stands as a verity in this case that the milk which the appellant proposed to sell is pure, wholesome, sanitary and meets all the requirements prescribed by the Beloit Milk Ordinance except that it was not pasteurized within the six mile zone.

This position when applied to the appellant is a clear violation of the Interstate Commerce Clause of the United States Constitution.

In *Schollenberger* v. *Pennsylvania,* 171 U. S. 1 18 S. Ct. 757 43 L. Ed. 49 this court held a Pennsylvania Statute was in violation of the Interstate Commerce Clause of the Constitution which prohibited the introduction and sale within its borders of oleomargarine. At page 12 Mr. Justice Peckham, speaking for the majority of the Court, stated:

> "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. *A state has power to regulate*

the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

In *Minnesota* v. *Barber*, 136 U. S. 313, *it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states.* This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman*, 138 U. S. 78, *and in Scott* v. *Donald*, 165 U. S. 58, 97.

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire*, 46 U. S. 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin*, 135 U. S. 100, the *New Hampshire* case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the

power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create.'

To the same effect, we think, is the case of *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U. S. 465, in which it was said that 'whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations.' The court, therefore, while conceding the right of the state to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a state could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated article into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be

mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopaedias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargerine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purposes the state cannot absolutely prohibit the introduction within the state of an article of commerce like pure oleomargarine."

The Supreme Court of Wisconsin stated in its opinion:

"This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State* v. *Chicago, Mil-*

waukee & St. Paul R. Co. (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co.* v. *Tracy* (1909), 141 Wis. 150, 123 N. W. 785." (R. 29-30)

The above pronouncement is in conflict with the decisions of this court upon the meaning and purpose of the Interstate Commerce Clause of the Constitution of the United States. The fact that the arbitrary circle drawn by the city of Beloit around itself includes approximately one hundred fifteen square miles of territory of the State of Illinois does not meet the constitutional requirements of Commerce originating beyond the rim of the circle. If the proposition stated by the Wisconsin Court is allowed to stand then all interstate commerce in this country will soon come to an end. Any state could effectively prohibit interstate commerce by allowing importation within its borders of goods produced within a limited zone beyond its boundaries.

The second proposition of the Wisconsin Court that the city of Beloit is free to act in the absence of action by Congress is also in conflict with the decisions of this Court. This court stated in *Freeman* v. *Hewit*, ...U. S...., 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 65 S. Ct. 1515 89 L. Ed. 1915; *Morgan* v. *Virginia*, 328 U. S. ...., 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power,

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as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

In *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep.:

"That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject."

In *Southern Pac. Co.* v. *State of Arizona*, 325 U. S. 761, 769, 65 S. Ct. 1515, 1520, this Court stated:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

In *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330, 64 S. Ct. 1023, 1026 this Court stated:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States."

The case of *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862 held unconstitutional the statute of the State of Virginia which provided for inspection of meat that was transported more than one hundred miles after slaughter and for an inspection fee of one cent a pound. Rebman was convicted for the sale of meat from animals slaughtered in Illinois. The United States Supreme Court held the Virginia statute unconstitutional. The Court stated:

> "Is the Statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The Statute is, in effect, a prohibition upon the sale in Virginia, of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the

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powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void."

The right of the City of Beloit to inspect appellant's milk before sale is not involved in this case. The provision of the Ordinance in question simply prohibits the sale of the milk altogether.

Beloit may regulate the introduction of a food product in such way as to insure its purity, but such power does not include the total exclusion of an article of food. 22 Am. Jur. Food Sec. 16 page 817.

The defense in this action consisted chiefly of the proposition that it was too expensive and inconvenient for the City of Beloit to inspect the additional sources of milk and the pasteurization plant from which the appellant would obtain the milk he proposed to sell. There is no objection to the purity, wholesomeness or sanitation of the milk which the appellant proposed to sell in Beloit. The objection is that the City of Beloit does not want to incur the inconvenience and expense necessary to satisfy itself that this milk does comply with the requirements of its Ordinance.

The Supreme Court of Wisconsin stated in its opinion:

> "The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident." (R. 28-29)

The record, however, shows that the city sanitarian and one assistant inspect the Grade A farms furnishing milk to Beloit about twice a year; that they inspect also 38 restaurants, 16 soda fountains, 18 light lunch establishments, 20 confectionery stores, 81 grocery and meat markets, 8 bakeries 53 taverns and clubs, 8 dairies and also supervise the collection of garbage from about 8,500 households, inspect 1,500 people engaged in handling food and also handle the daily complaints and the quarrantine of contagious diseases. In their spare time they look after the correspondence that comes into the office.

The city sanitarian also testified that if additional farms and pasteurization plants from which the appellant proposed to obtain his milk were all located within the six mile zone that he and his assistant would not have time to inspect them; an additional inspector would cost the City of Beloit about $200.00 per month plus travelling expenses and that, "it would be hard to say whether his work would be devoted to inspecting additional farms without first laying out a program." (R. 12-13)

The record shows that the farms and plant from which the appellant would obtain his milk were inspected by cities in Illinois obtaining milk from the Dean Milk Company and by the inspectors of the Dean Milk Company itself twice a week. The farms within the six mile zone furnishing Grade A milk are inspected only twice a year

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by th City of Beloit and those furnishing Grade B milk are not inspected at all.

Section 11 of the Model Milk Ordinance and Code, recommended by the United States Public Health Service and prepared by direction of the Surgeon General of the United States provides:

> "*Sec.* 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: *Provided,* That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

The provision of the Model Milk Code is perfectly reasonable and is an adequate safeguard to insure the purity and sanitation of the milk—in fact, the Beloit Milk Ordinance, Sec. (X) (6) authorizes a similar procedure. This section provides:

> "(6) The Health Officer or any officially appointed representative he may so designate shall inspect periodically or at such time as convenient or which expediency may require, every dairy farm producing milk and cream for consumption within the city of Beloit and all milk plants whose milk and cream are intended for consumption within the city of Beloit."

Section (X) (7) of the Beloit Milk Ordinance authorizes the health officer to examine samples of the milk and to make all of the tests recommended by the American Public Health Association and Association of Official Agricultural Chemists to determine the purity and sanitation of the milk.

The milk which the appellant proposed to furnish is regularly inspected twice a week both as to the sources of the milk and pasteurization plant and the means of transportation by cities with ordinances just as exacting and stringent as the Beloit City Ordinance. The city sanitarian of Beloit, with little expense and inconvenience, could easily determine whether or not this inspection was being made in the proper manner and whether or not the requirements of the Ordinances of the Illinois cities were being met.

The location of the pasteurization plant 25 or 35 miles from the City of Beloit in this day of modern roads and automobiles presents no great inconvenience. As to the inspection of the additional farms the Beloit City Ordinance prescribes no limitation as to the location of the farms; the six mile limit applies only to the pasteurization plant.

In view of the frank admission of the city sanitarian that he would be unable to inspect the additional farms and the pasteurization plant even if they were located within the six mile limit destroys the excuse that the appellant should be barred from engaging in Interstate Commerce because of the inconvenience and expense in determining whether or not his product is pure, wholesome and sanitary.

The same excuse that the city of Beloit makes was made by the State of Minnesota and denied by this Court in the case of *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455. That case involved the sale of fresh meat. It is common knowledge that fresh meat is subject to contamination to an equal extent as milk. The Minnesota statute prohibited the sale of fresh meat in Minnesota unless the animal had been inspected in Minnesota before slaughter. Barber was convicted of selling meat

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in Minnesota which had been slaughtered in Illinois. The State of Minnesota argued that it could not determine whether or not the animal was healthy by merely inspecting the meat when it was offered for sale. The State of Minnesota contended that it could only be determined whether or not the animal was healthy by inspecting the animal before slaughter. It also contended that it had a right to have this fact determined by its own inspectors and that it was too inconvenient and expensive for its inspectors to go to Illinois and other states and inspect the animal before slaughter. This contention was rejected by the United States Supreme Court and this Court stated at page 458:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. * * * When to this is added the fact that the Statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. *It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food.* If the object of the Statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from

> animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota Statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

In the lower courts, the case of *Miller* v. *Williams,* 12 Federal Supp. 236 held unconstitutional a regulation of the Health Commissioner of Baltimore City which prohibited the use or sale of cream for the manufacture of ice cream produced by dairies situated more than fifty miles from the City limits. The plaintiff, a citizen of Pennsylvania, with principal place of business at Philadephia, sought an injunction against the regulation. The City defended upon the ground that "there are more than 4,000 dairy farms within the 50 mile limit from Baltimore and the number of available inspectors is, as a matter of reasonable expense, necessarily limited. With regard to distantly located dairy plants, for instance those in Wisconsin, it is said to be impossible to make such frequent inspections and to carry on such educational work as is possible within a limited distance from Baltimore City." Judge Chestnut held the regulation to be in conflict with both the Due Process and Interstate Commerce Clauses of the Constitution. In his opinion, he stated:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the State of Maryland (in the absence of a state statute) outside the zone

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or from the point of view of being a direct burden upon interstate commerce. From the latter aspect, the applicable principles of constitutional law are now well settled. Freedom of commerce between the states is the rule and not the exception. Under the Constitution it may be regulated by Congress but unless otherwise specifically so regulated, the states may exercise their police power by statute and may authorize their municipal corporations to do so by ordinances, provided the latter are reasonably adapted to the legitimate end of protecting the health, morals and welfare of the community. But when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends and constitute a direct burden upon interstate commerce, they must fall, 12 C. J. 52, 60, 81. The principle here involved has been very recently applied by the Supreme Court of the United States to interstate shipments of milk in the case of *Baldwin, Commissioner* v. *Seelig,* 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032. There a statute of New York which required a minimum price to be paid producers of milk within the State and further provided that no milk from other states should be sold in New York unless the same minimum prices were paid to producers in foreign states, was held unconstitutional as applied to interstate shipments of milk from Vermont, when sold in the original package, whether in the cans in which transported or as milk bottled therefrom. Said Mr. Justice Cardozo (294 U. S. 511, pages 521, 522, 55 S. Ct. 497, 499, 79 L. Ed. 1032):

'New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibi-

tion of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Constitution, art 1, § 10, cl. 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. 1 §8, cl. 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." • • • Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." '

• • • • •

"If the principle of this regulation is once established as to milk it could seemingly be extended to other food products such as vegetables, fruits and meats, which are likewise subject, although perhaps in less stringent degree, to food inspection and exclusion laws, but only when reasonable. • • • The result might well be that Baltimore would be made an isolated sanitary area for much of its food supply, although it is certainly not intended to suggest that such an unreasonable extension of the principle is at all likely to be proposed by our very efficient Health Commissioner. The principle, however, is one that runs directly counter to the constitutional freedom of the interstate commerce."

• • • • •

"The real objection of the Health Department to the foreign cream is based on the alleged impractica-

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bility of adequate and effective supervision by its own representatives of the dairy farms which produce the milk supply from remotely situated foreign dairy plants. This of itself is not a sufficient basis for excluding the cream although very probably it would support regulations of a somewhat different nature than those applicable to the local supply which would afford every reasonable assurance to the Health Commissioner for the protection of the health of the community."

It is submitted that the provision of the Beloit Ordinance which requires milk to be pasteurized within the six mile zone is in violation of the Interstate Commerce Clause of the Constitution of the United States.

II.

The provision of the Beloit Ordinance which prohibits the sale of milk not pasteurized within the six mile zone is arbitrary, discriminatory and in violation of the 14th Amendment of the United States Constitution.

The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Beloit could make arrangements to inspect enough of the surrounding territory to supply it with milk and prohibit entry of milk originating beyond the artificial line prescribed by the Ordinance. This philosophy is set forth in the following quotation from the opinion of the Supreme Court of the State of Wisconsin:

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, *where the court said that milk production is a legitimate business and so long as persons engaged in the*

business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt. (Italics ours).

"Counsel for appellant relies on *State ex rel. Larson* v. *City of Minneapolis, supra,* and *La Francei* v. *City of Santa Rosa,* 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens." (Italics ours) (R. 29).

The six mile zone was drawn without reasonable relation to the supposed object to be obtained by the city. The chief health officer of the city testified that with his present staff they would be unable to inspect the milk plant and the additional farms from which the appellant proposed to obtain his milk even though the plant and farms were located within the six mile zone.

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This means that the city arbitrarily limited the business to those who were already engaged in the business and prohibited newcomers from competing for the business.

Under the doctrine above announced by the Supreme Court of the State of Wisconsin every city and village could build a trade barrier around itself and include so much of the surrounding territory as the city deemed necessary to serve the population and to suit its own convenience as to inspection. This doctrine is not confined merely to milk, other articles of food such as meat, bakery goods, fruits and vegetables are subject to being inspected. Any article of food which the city has a right to inspect to determine its fitness for human consumption could be excluded from Interstate Commerce if it originated or was produced beyond the artificial line which the city saw fit to draw around itself.

Every decision of the Courts of last resort in this country has held such requirements to be in violation of due process of law excepting the decision here under review.

State ex rel. Larson v. *City of Minneapolis* 190 Minn. 138, 251 N. W. 121 was a mandamus to compel the respondents to issue to relator a license to sell pasteurized milk and its products within the City of Minneapolis.

The question presented involved the constitutionality of a city ordinance which made it unlawful to sell pasteurized milk in Minneapolis unless it was pasteurized in plants located within the city limits.

Petitioner's plant was located 30 miles beyond the city limits.

The trial court found that the inspection necessary to safeguard the public health:

"is attended with substantial public expense, which is greater or less according to the distance to be traveled by the inspectors for the purpose of making such inspection"

and that this ordinance was reasonable in that respect. The Supreme Court of Minnesota reversed the trial court and stated in the opinion:

"The issue, then, is limited to the question of whether or not provision by the city for adequate inspection of relator's pasteurization plant, transportation facilities, etc., is so expensive and inconvenient to the city as to justify prohibition by it of relator's established business unless he moves his pasteurization plant into the city."

"If the inspection fee is deemed insufficient, there appears to be no good reason why such insufficiency can not be remedied in a manner that would impose no unjust hardship on any one concerned. There is nothing in the record to show what, if any, inconvenience the city may be put to that would justify such a harsh requirement as provided by the ordinance. We are obliged to hold that the ordinance, in so far as it prohibits the sale of pasteurized milk or its products in the city of Minneapolis, unless the same shall have been pasteurized in a pasteurization plant located within the city limits, violated relator's constitutional rights of property and contract. The restriction contained therein goes 'beyond the reasonable demands of the occasion,' and is not adaptable to the end sought."

In the *Larson* case Ninety-seven per cent (97%) of the milk and Ninety-nine and one-tenth per cent (99.1%) of the cream consumed in the city were pasteurized in plants located within the city limits; the city had three milk inspectors, one inspected raw milk and two pasteurized milk. One of the latter spent one-half of his time on plants located outside of the city. Notwithstanding these facts the Minnesota court stated:

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> "The restriction contained therein goes 'beyond the reasonable demands of the occasion,' and *is not adaptable to the end sought.*"

The trial court in the case at bar stated in its opinion:

> "The petitioner herein has made no offer to assume or repay the additional expense necessary to have such additional inspections made." (R. 6).

The answer to that proposition is that the Beloit City Ordinance makes no provision for payment of any of the expenses of inspection, and the appellant has no control over the staffing and regulating of the Health Department of the City of Beloit.

The same argument was made in the *Larson* case and that was answered by the Supreme Court of Minnesota:

> "If the inspection fee is deemed insufficient, there appears to be no good reason why such insufficiency can not be remedied in a manner that would impose no unjust hardship on any one concerned."

Furthermore, the objection made by the trial court is not apropos to the case at bar because the license was refused to the appellant on the sole ground that the pasteurization plant from which he proposed to obtain his milk was not located within the six mile zone.

Sheffield Farms Co., Inc. v. *Seaman,* 114 N. J. L. 455, 177 A. 372 was a proceeding in *certiorari* to review the action of the Health Department of the City of Perth Amboy, N. J. in refusing to grant petitioner a permit to sell and distribute its milk in Perth Amboy.

The Health Department refused the permit because it did not have sufficient personnel or funds to inspect petitioner's milk. The Department was already inspecting 21 duly licensed distributors, 350 licensed retailers and 2,000 separate sources of milk.

The city had an adequate supply of milk and the price was fixed by the State Milk Control Board.

The Supreme Court set the refusal aside, stating:

"It is next urged that the refusal was based on a sound discretion lodged in those possessing the power to grant the permit. This is not so. There is no such discretion in the granting power in the premises. Moreover, even if such an unreasonable, arbitrary, and capricious discretion were delegated or vested in the granting power it would be illegal.

"It is further contended for the respondents that the permit was refused in order to conserve public health and safety, and that the city is without funds to inspect and supervise the sources of prosecutor's supply of milk.

"Here, again, the argument finds no support in the record of the stipulated facts. Respondents concede that they have no knowledge respecting the quality of prosecutor's milk and milk products, or the sanitary condition under which its milk is produced, handled, or marketed. It clearly could not, therefore, form a judgment of refusal to grant the permit on unknown or undetermined facts. Nor does the mere lack of funds to investigate the facts justify the refusal. The Legislature has provided for such a contingency. See section 10, chapter 131, P. L. 1932, p. 222, at p. 235 N. J. St. Annual 1932, p. 81-162A (10).

"It will serve no useful purpose to answer or further discuss the purported reason argued upon which the refusal is sought to be justified. Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prose-

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cutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do.

"The refusal is set aside, with costs."

LaFranchi v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 P. (2d) 1301, was an action for declaratory relief. The ordinance prohibited sale of milk within Santa Rosa that was pasteurized outside of the city limits. The Supreme Court of California reversed the lower court and held the ordinance unconstitutional. After reviewing the cases from other jurisdictions the Supreme Court stated (page 1304):

"* * * In other words, it has been held quite generally that the city limits as the boundary line outside of which plants may not be located if the milk is to be sold within the city do not have a reasonable relationship to a proper legislative object and therefore ordinances fixing such a boundary are invalid.

"In line with the authorities from other jurisdictions from which we have quoted are those from our own courts declaring that ordinances designed for the purpose of erecting tariff barriers are void. * * *"

Meridian v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884, held invalid an ordinance of the City of Stockton. The effect of the ordinance was to prevent milk from being brought beyond the boundaries of San Joaquin County and sold in Stockton. The upper court held that the ordinance violated both the California Statute and Constitution, at page 886, the court stated:

"If the position of respondent is sound, it may lead to dire results. It would be possible for every city in the State of California to erect prohibitive trade barriers around the boundary of the county

of its locale; not only milk, but many other food products designed for human consumption could be barred in this same manner. The free flow of goods from one community to another is conducive to the general prosperity and economic welfare of the state and nation. Furthermore, milk production is a legitimate business; millions of dollars in this state are invested in this industry, and so long as the persons engaged in this business put out a clean, pure and wholesome product, a way should be found to allow their products to flow freely in the market, unburdened by duplication of inspection and prohibitive trade barriers, and if the present law on our statute books can be given a reasonable construction which will bring about this result, it should be given such construction."

At page 888:

"Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, held invalid an ordinance of Louisville which prohibited the sale of milk from plants located outside of Louisville and not engaged in business when the ordinance was enacted. Plaintiff built his plant after the ordinance was enacted and outside of Louisville. Plaintiff sought to sell Grade A raw milk in Louisville. The court held the ordinance unreasonable and unconstitutional. At page 285 the court stated:

"The general rule as to the regulations in the sale of ordinary articles of commerce, such as milk, is only that they must be reasonable to be valid."

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"*Loaf Baking Co.* v. *Pace* (Tex. Civ. App.), 19 S. W. (2d) 459; *City of Des Moines* v. *Fowler* (Iowa), 255 N. W. 880; *Whitney* v. *Watson, et al.*, 85 N. H. 238, 157 A. 78, 80. In the last mentioned case, the principles applicable to regulation of the sale of milk were thus stated: 'Dairy products are normally legitimate subjects of commerce, interference with which is justifiable only so far as the protection of the public health requires. To that extent the Legislature may regulate and limit their sales. Beyond this, the marketing of such products is a matter of right. It is in the interest of the purchasing public as well as of the producer that a license be granted the latter when he has fulfilled the legislative requirements."

Prescott v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578, involved an ordinance of the City of Borger. The ordinance prohibited sale of milk not pasteurized within the county. Plaintiff's plant was 60 miles away and in another county. The Court held the ordinance was in conflict with both the Texas Statute and Constitution.

The attorney-General of Michigan on November 6, 1946, ruled that a milk ordinance prescribing a 30 mile limit for the City of Midland, Michigan, was invalid and in conflict with the Fourteenth Amendment. We have set this opinion out in full in the appendix of this brief.

We submit that the provision of the Beloit Milk Ordinance prohibiting the sale of the milk within the city which is pasteurized in plants located outside the six mile zone is in violation of the Interstate Commerce Clause of the United States and that it deprives the appellant of his property rights and the right to contract in violation of the Fourteenth Amendment to the Constitution of the United States; that the said provision is arbitrary, unreasonable and discriminatory and that the

judgment of the Supreme Court of the State of Wisconsin should be reversed.

Respectfully submitted,

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APPENDIX.

PUBLIC HEALTH BULLETIN.
No. 220
(1939 Edition)

UNITED STATES PUBLIC HEALTH SERVICE MILK ORDINANCE

(This unabridged form of the ordinance should be adopted only where the short enabling form in part I is not considered legal.)

An ordinance defining "milk" and certain "milk products," "milk producer," "pasteurization," etc., prohibiting the sale of adulterated and misbranded milk and milk products, requiring permits for the sale of milk and milk products, regulating the inspection of dairy farms and milk plants, the examination, grading, labeling, placarding, pasteurization, regrading, distribution, and sale of milk and milk products, providing for the publishing of milk grades, the construction of future dairies and milk plants, the enforcement of this ordinance, and the fixing of penalties.

Be it ordained by the.....of the city of ..... as follows:

SECTION 1. *Definitions.*—The following definitions shall apply in the interpretation and the enforcement of this ordinance:

A. *Milk.*—Milk is hereby defined to be the lacteal secretion obtained by the complete milking of one or more

healthy cows, excluding that obtained within 15 days before and 5 days after calving, or such longer period as may be necessary to render the milk practically colostrum free; which contains not less than 8 percent of milk solids not fat, and not less than 3¼ percent of milk fat.

B. *Milk fat or butter fat.*—Milk fat or butter fat is the fat of milk.

C. *Cream and sour cream.*—Cream is a portion of milk which contains less than 18 percent milk fat. Sour cream is cream the acidity of which is more than 0.20 percent, expressed as lactic acid.

D. *Skimmed milk.*—Skimmed milk is milk from which a sufficient portion of milk fat has been removed to reduce its milk-fat percentage to less than 3¼ percent.

E. *Milk or skimmed-milk beverage.*—A milk beverage or a skimmed-milk beverage is a food compound or confection consisting of milk or skimmed milk, as the case may be, to which has been added a sirup or flavor consisting of wholesome ingredients.

F. *Buttermilk.*—Buttermilk is a product resulting from the churning of milk or cream, or from the souring or treatment by a lactic acid or other culture of milk, skimmed milk, reconstituted skimmed milk, evaporated or condensed milk or skimmed milk, or milk or skimmed-milk powder. It contains not less than 8 percent of milk solids not fat.

G. *Vitamin D milk.*—Vitamin D milk is milk the vitamin D content of which has been increased by a method and in an amount approved by the health officer.

H. *Reconstituted or recombined milk and cream.*—Reconstituted or recombined milk is a product resulting

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from the recombining of milk constituents with water, and which complies with the standards for milk fat and solids not fat of milk as defined herein. Reconstituted or recombined cream is a product resulting from the combination of dried cream, butter, or butter fat with cream, milk, skimmed milk, or water.

I. *Goat milk.*—Goat milk is the lacteal secretion, free from colostrum, obtained by the complete milking of healthy goats, and shall comply with all the requirements of this ordinance. The word "cows" shall be interpreted to include goats.

J. *Homogenized milk.*—Homogenized milk is milk which has been treated in such manner as to insure break-up of the fat globules to such an extent that after 48 hours storage no visible cream separation occurs on the milk and the fat percentage of the top 100 cc. of milk in a quart bottle, or of proportionate volumes in containers of other sizes, does not differ by more than 5 percent of itself from the fat percentage of the remaining milk as determined after thorough mixing.

K. *Milk products.*—Milk products shall be taken to mean and include cream, sour cream, homogenized milk, goat milk, vitamin D milk, buttermilk, skimmed milk, reconstituted or recombined milk and cream, milk beverages, skimmed-milk beverages, and any other product made by the addition of any substance to milk or any of these products and used for similar purposes and designated as a milk product by the health officer.

L. *Pasteurization.*—The terms "pasteurization," "pasteurized," and similar terms shall be taken to refer to the process of heating every particle of milk or milk products to at least 143° F., and holding at such tem-

perature for at least 30 minutes, or to at least 160° F., and holding at such temperature for at least 15 seconds, in approved and properly operated equipment: *Provided*, That nothing contained in this definition shall be construed as disbarring any other process which has been demonstrated to be equally efficient and is approved by the State health authority.

M. *Adulterated milk and milk products.*—Any milk or milk product which contains any unwholesome substance, or which if defined in this ordinance does not conform with its definition, or which carries a grade label unless such grade label has been awarded by the health officer and not revoked, shall be deemed adulterated and misbranded.

N. *Milk producer.*—A milk producer is any person who owns or controls one or more cows a part or all of the milk or milk products from which is sold or offered for sale.

O. *Milk distributor.*—A milk distributor is any person who offers for sale or sells to another any milk or milk products for human consumption as such.

P. *Dairy or dairy farm.*—A dairy or dairy farm is any place or premises where one or more cows are kept, a part or all of the milk or milk products from which is sold or offered for sale.

Q. *Milk plant.*—A milk plant is any place or premises or establishment where milk or milk products are collected, handled, processed, stored, bottled, pasteurized, or prepared for distribution.

R. *Health officer.*—The term "health officer" shall mean the health authority of the city of....., or his authorized representative.

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S. *Average bacterial plate count, direct microscopic count, reduction time, and cooling temperature.*—Average bacterial plate count and average direct microscopic count shall be taken to mean the logarithmic average, and average reduction time and average cooling temperature shall be taken to mean the arithmetic average, of the respective results of the last four consecutive samples, taken upon separate days, irrespective of the date of grading or regrading.

T. *Grading period.*—The grading period shall be such period of time as the health officer may designate within which grades shall be determined for all milk and milk products, provided that the grading period shall in no case exceed 6 months.

U. *Person.*—The word "person" as used in this ordinance shall mean "person, firm, corporation, or association."

V. *And/or.*—Where the term "and/or" is used "and" shall apply where possible, otherwise "or" shall apply.

SEC. 2. *The sale of adulterated milk, or ungraded milk or milk products prohibited.*—No person shall within the city of ....., or its police jurisdiction, produce, sell, offer, or expose for sale, or have in possession with intent to sell, any milk or milk product which is adulterated, misbranded, or ungraded. It shall be unlawful for any person, elsewhere than in a private home, to have in possession any adulterated, misbranded, or ungraded milk or milk product.

SEC. 3. *Permits.*—It shall be unlawful for any person to bring into or receive into the city of ....., or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined

in this ordinance, who does not possess a permit from the health officer of the city of .....

Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

Such a permit may be suspended by the health officer, or revoked after an opportunity for a hearing by the health officer, upon the violation by the holder of any of the terms of this ordinance.

SEC. 4. *Labeling and placarding.*—All bottles, cans, packages, and other containers enclosing milk or any milk product defined in this ordinance shall be plainly labeled or marked with (1) the name of the contents as given in the definitions in this ordinance; (2) the grade of the contents; (3) the word "pasteurized" only if the contents have been pasteurized; (4) the word "raw" only if the contents are raw; (5) the phrase "for pasteurization" if the contents are to be pasteurized; (6) the name of the producer if the contents are raw, and the name of the plant at which the contents were pasteurized, if the contents are pasteurized; and (7) in the case of Vitamin D milk, the designation "Vitamin D Milk" and the source of the vitamin D. The label or mark shall be in letters of a size, kind, and color approved by the health officer and shall contain no marks or words which are misleading.

Every restaurant, cafe, soda fountain, or other establishment serving milk or milk products shall display at all times, in a place designated by the health officer, a notice approved by the health officer, stating the lowest grade of milk and/or milk products served.[4]

[4] Cities in which only grade A pasteurized milk or only certified milk and grade A pasteurized milk are permitted to be sold may delete this paragraph and nevertheless be recognized as having adopted this ordinance.

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SEC. 5. *Inspection of dairy farms and milk plants for the purpose of grading or regrading.*—At least once during each grading period the health officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city of ....., or its police jurisdiction. In case the health officer discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days; and the second inspection shall be used in determining the grade of milk and/or milk products. Any violation of the same item of this ordinance on two consecutive inspections shall call for immediate degrading.

One copy of the inspection report shall be posted by the health officer in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the health officer. Another copy of the inspection report shall be filed with the records of the health department.

SEC. 6. *The examination of milk and milk products.*—During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. Samples of other milk products may be taken and examined by the health officer as often as he deems necessary. Samples of milk and milk products from stores, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the health officer may require. Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Associ-

ation.[5] Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists.[5] Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains, and other similar places shall furnish the health officer, upon his request, with the names of all distributors from whom their milk and milk products are obtained. Bio-assays of the vitamin D content of vitamin D milk shall be made when required by the health officer in a laboratory approved by him for such examinations.

Whenever the average bacterial count, the average reduction time, or the average cooling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take an additional sample, but not before the lapse of 3 days, for determining a new average in accordance with section 1 (S). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension

[5] Municipalities in which the adoption of legislation by reference is not considered legal may substitute the following wording: "* * * in conformity with the regulations of the health officer (or board of health)." If the regulations then adopted by the health officer are equivalent to those contained in the reference thus replaced, they will not be considered as constituting a downward revision of the U. S. Public Health Service milk ordinance.

All other references in this ordinance to standards and methods not specifically described may be treated in the same manner, such as the requirements of the American Association of Medical Milk Commissions under the definition of certified milk-raw, the requirements of the Bureau of Animal Industry relative to accredited herds and modified accredited areas in item 1r, and the U. S. Public Health Service milk code in section 15.

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of the permit, unless the last individual result is within the grade limit.

SEC. 7. *The grading of milk and milk products.*—At least once every 6 months the health officer shall announce the grades of all milk and milk products delivered by all producers or distributors and ultimately consumed within the city of ....., or its police jurisdiction. Said grades shall be based upon the following standards, the grading of milk products being identical with the grading of milk except that the bacterial standards shall be doubled in the case of cream, and omitted in the case of sour cream and buttermilk. Vitaman D milk shall be only of grade A or grade B pasteurized, certified, or grade A raw quality.

Certified milk-raw.—Certified milk-raw is raw milk which conforms with the requirements of the American Association of Medical Milk Commissions* in force at the time of production and is produced under the supervision of a medical milk commission and of the State board of health or of the city or county health officer of .....

Grade A raw milk.—Grade A raw milk is raw milk the average bacterial plate count of which as determined under sections 1 (S) and 6 of this ordinance does not exceed 50,000 per cubic centimeter, or the average direct microscopic count of which does not exceed 50,000 per cubic centimeter if clumps are counted or 200,000 per cubic centimeter if individual organisms are counted, or the average reduction time of which is not less than 8 hours: *Provided,* That if it is to be pasteurized the corresponding limits shall be 200,000 per cubic centimeter, 200,000 per cubic centimeter, 800,000 per cubic

* See footnote 5, p. 7.

centimeter, and 6 hours, respectively; and which is produced upon dairy farms conforming with all of the following items of sanitation.

ITEM 1 r. *Cows, tuberculosis and other diseases.*—Except as provided hereinafter, a tuberculin test of all herds and additions thereto shall be made before any milk therefrom is sold, and at least once every 12 months thereafter, by a licensed veterinarian approved by the State livestock sanitary authority. Said tests shall be made and reactors disposed of in accordance with the requirements approved by the United States Department of Agriculture, Bureau of Animal Industry,[6] for accredited herds. A certificate signed by the veterinarian or attested to by the health officer and filed with the health officer shall be evidence of the above test: *Provided*, That in modified accredited counties in which the modified accredited area plan is applied to the dairy herds the modified accredited area system approved by the United States Bureau of Animal Industry[6] shall be accepted in lieu of annual testing.

Within .....[7] years after the adoption of this ordinance all milk and milk products consumed raw shall be from herds or additions thereto which have been found free from Bang's disease, as shown by blood serum tests for agglutinins against *Brucella abortus* made in a laboratory approved by the health officer. All such herds shall be retested at least every 12 months and all reactors removed from the herd. A certificate identifying each animal by number, and signed by the laboratory making the test, shall be evidence of the above test.

Cows which show an extensive or entire induration of one or more quarters of the udder upon physical exami-

[6] See footnote 5, p. 7.

[7] The number should be inserted when the ordinance is adopted. It should not exceed 5 years if the community wishes to be recognized as having adopted this ordinance.

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nation, whether secreting abnormal milk or not, shall be permanently excluded from the milking herd. Cows giving bloody, stringy, or otherwise abnormal milk, but with only slight induration of the udder, shall be excluded from the herd until re-examination shows that the milk has become normal.

For other diseases such tests and examinations as the health officer may require shall be made at intervals and by methods prescribed by him, and any diseased animals or reactors shall be disposed of as he may require.

ITEM 2r. *Dairy barn, lighting.*—A dairy or milking barn shall be required and in such sections thereof where cows are milked windows shall be provided and kept clean and so arranged as to insure adequate light properly distributed, and when necessary shall be provided with adequate supplementary artificial light.

ITEM 3r. *Dairy barn, air space and ventilation.*—Such sections of all dairy barns where cows are kept or milked shall be well ventilated and shall be so arranged as to avoid overcrowding.

ITEM 4r. *Dairy barn, floors.*—The floors and gutters of such parts of all dairy barns in which cows are milked shall be constructed of concrete or other approved impervious and easily cleaned material, provided that if the milk is to be pasteurized tight wood may be used, shall be graded to drain properly, and shall be kept clean and in good repair. No horses, pigs, fowl, calves, etc., shall be permitted in parts of the barn used for milking.

ITEM 5r. *Dairy barn, walls and ceilings.*—The walls and ceilings of all dairy barns shall be whitewashed once

each year or painted once every 2 years, or oftener, if necessary, or finished in an approved manner, and shall be kept clean and in good repair. In case there is a second story above that part of the barn in which cows are milked the ceiling shall be tight. If the feed room adjoins the milking space, it shall be separated therefrom by a dust-tight partition and door. No feed shall be stored in the milking portion of the barn.

ITEM 6r. *Dairy barn, cowyard.*—All cowyards shall be graded and drained as well as practicable and kept clean.

ITEM 7r. *Manure disposal.*—All manure shall be removed and stored or disposed of in such manner as best to prevent the breeding of flies therein or the access of cows to piles thereof.

ITEM 8r. *Milk house or room, construction.*—There shall be provided a milk house or milk room in which the cooling, handling, and storing of milk and milk products and the washing, bactericidal treatment, and storing of milk containers and utensils shall be done. (*a*) The milk house or room shall be provided with a tight floor constructed of concrete or other impervious material, in good repair, and graded to provide proper drainage. (*b*) It shall have walls and ceilings of such construction as to permit easy cleaning, and shall be well painted or finished in an approved manner. (*c*) It shall be well lighted and ventilated. (*d*) It shall have all openings effectively screened including outward-opening, self-closing doors, unless other effective means are provided to prevent the entrance of flies. (*e*) It shall be used for no other purposes than those specified above except as may be approved by the health officer; shall not open directly into a stable or into any room used for domestic

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purposes; shall, unless the milk is to be pasteurized, have water piped into it; shall be provided with adequate facilities for the heating of water for the cleaning of utensils; shall be equipped with two-compartment stationary wash and rinse vats, except that in the case of retail raw milk, if chlorine is employed as the principal bactericidal treatment, the three-compartment type must be used; and shall, unless the milk is to be pasteurized, be partitioned to separate the handling of milk and the storage of cleansed utensils from the cleaning and other operations, which shall be so located and conducted as to prevent any contamination of the milk or of cleaned equipment.

ITEM 9r. *Milk house or room, cleanliness and flies.*—The floors, walls, ceilings, and equipment of the milk house or room shall be kept clean at all times. All means necessary for the elimination of flies shall be used.

ITEM 10r. *Toilet.*—Every dairy farm shall be provided with one or more sanitary toilets conveniently located and properly constructed, operated, and maintained, so that the waste is inaccessible to flies and does not pollute the surface soil or contaminate any water supply.

ITEM 11r. *Water supply.*—The water supply for the milk room and dairy barn shall be properly located, constructed, and operated, and shall be easily accessible, adequate, and of a safe sanitary quality.

ITEM 12r. *Utensils, construction.*—All multi-use containers or other utensils used in the handling, storage, or transportation of milk or milk products must be made of smooth nonabsorbent material and of such construction as to be easily cleaned, and must be in good repair. Joints and seams shall be soldered flush. Woven wire cloth shall not be used for straining milk. All milk

pails shall be of a small-mouth design approved by the health officer. The manufacture, packing, transportation, and handling of single-device containers and container caps and covers shall be conducted in a sanitary manner.

ITEM 13r. *Utensils, cleaning.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage.

ITEM 14r. *Utensils, bactericidal treatment.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk or milk products shall between each usage be subjected to an approved bactericidal process with steam, hot water, chlorine, or hot air.

ITEM 15r. *Utensils, storage.*—All containers and other utensils used in the handling, storage, or transportation of milk or milk products shall be stored so as not to become contaminated before being used.

ITEM 16r. *Utensils, handling.*—After bactericidal treatment no container or other milk or milk product utensil shall be handled in such manner as to permit any part of any person or his clothing to come in contact with any surface with which milk or milk products come in contact.

ITEM 17r. *Milking, udders and teats, abnormal milk.*—The udders and teats of all milking cows shall be clean and rinsed with a bactericidal solution at the time of milking. Abnormal milk shall be kept out of the milk supply and shall be so handled and disposed of as to preclude the infection of the cows and the contamination of milk utensils.

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ITEM 18r. *Milking, flanks.*—The flanks, bellies, and tails of all milking cows shall be free from visible dirt at the time of milking.

ITEM 19r. *Milkers' hands.*—Milkers' hands shall be clean, rinsed with a bactericidal solution, and dried with a clean towel immediately before milking and following any interruption in the milking operation. Wet-hand milking is prohibited. Convenient facilities shall be provided for the washing of milkers' hands.

ITEM 20r. *Clean clothing.*—Milkers and milk handlers shall wear clean outer garments while milking or handling milk, milk products, containers, utensils, or equipment.

ITEM 21r. *Milk stools.*—Milk stools shall be kept clean.

ITEM 22r. *Removal of milk.*—Each pail of milk shall be removed immediately to the milk house or straining room. No milk shall be strained or poured in the dairy barn.

ITEM 23r. *Cooling.*—Milk must be cooled immediately after completion of milking to 50° F. or less, and maintained at that average temperature, as defined in section 1 (S), until delivery. If milk is delivered to a milk plant or receiving station for pasteurization or separation, it must be delivered within 2 hours after completion of milking or cooled to 70° F. or less and maintained at that average temperature until delivered.

ITEM 24r. *Bottling and capping.*—Milk and milk products shall be bottled from a container with a readily cleanable valve, or by means of an approved bottling machine. Bottles shall be capped by machine. Caps or cap stock shall be purchased in sanitary containers and kept therein in a clean dry place until used.

ITEM 25r. *Personnel, health.*—The health officer or a physician authorized by him shall examine and take a careful morbidity history of every person connected with a retail raw dairy, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. If such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

ITEM 26r. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk prod-

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ucts shall have the name of the distributor prominently displayed.

The immediate surroundings of the dairy shall be kept in a neat, clean condition.

Grade B raw milk.—Grade B raw milk is raw milk which violates the bacterial standard and/or the abortion testing requirement for grade A raw milk, but which conforms with all other requirements for grade A raw milk, and has an average bacterial plate count not exceeding 1,000,000 per cubic centimeter, or an average direct microscopic count not exceeding 1,000,000 per cubic centimeter if clumps are counted or 4,000,000 per cubic centimeter if individual organisms are counted, or an average reduction time of not less than 3½ hours, as determined under sections 1 (S) and 6.

Grade C raw milk.—Grade C raw milk is raw milk which violates any of the requirements for grade B raw milk.

Certified milk-pasteurized.—Certified milk-pasteurized is certified milk-raw which has been pasteurized, cooled, and bottled in a milk plant conforming with the requirements for grade A pasteurized milk.

Grade A pasteurized milk.—Grade A pasteurized milk is grade A raw milk, with such exceptions as are indicated if the milk is to be pasteurized, which has been pasteurized, cooled, and bottled in a milk plant conforming with all of the following items of sanitation and the average bacterial plate count of which at no time after pasteurization and until delivery exceeds 30,000 per cubic centimeter, as determined under sections 1 (S) and 6.

The grading of a pasteurized milk supply shall include the inspection of receiving and collecting stations with

respect to items 1p to 15p, inclusive, and 17p, 19p, 22p, and 23p, except that the partitioning requirement of item 5p shall not apply.

ITEM 1p. *Floors.*—The floors of all rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall be constructed of concrete or other equally impervious and easily cleaned material and shall be smooth, properly drained, provided with trapped drains, and kept clean.

ITEM 2p. *Walls and ceilings.*—Walls and ceilings of rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall have a smooth, washable, light-colored surface and shall be kept clean.

ITEM 3p. *Doors and windows.*—Unless other effective means are provided to prevent the access of flies, all openings into the outer air shall be effectively screened and doors shall be self-closing.

ITEM 4p. *Lighting and ventilation.*—All rooms shall be well lighted and ventilated.

ITEM 5p. *Miscellaneous protection from contamination.*—The various milk-plant operations shall be so located and conducted as to prevent any contamination of the milk or of the cleaned equipment. All means necessary for the elimination of flies shall be used. There shall be separate rooms for (*a*) the pasteurizing, processing, cooling, and bottling operations, and (*b*) the washing and bactericidal treatment of containers. Cans of raw milk shall not be unloaded directly into the pasteurizing room. Pasteurized milk or milk products shall not be permitted to come in contact with equipment with which unpasteurized milk or milk products have been in contact, unless such

equipment has first been thoroughly cleaned and subjected to bactericidal treatment. Rooms in which milk, milk products, cleaned utensils, or containers are handled or stored shall not open directly into any stable or living quarters. The pasteurization plant shall be used for no other purposes than the processing of milk and milk products and the operations incident thereto, except as may be approved by the health officer.

ITEM 6p. *Toilet facilities.*—Every milk plant shall be provided with toilet facilities conforming with the ordinances of the city of ..... Toilet rooms shall not open directly into any room in which milk, milk products, equipment, or containers are handled or stored. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair, and well ventilated. In case privies or earth closets are permitted and used, they shall be separate from the building, and shall be of a sanitary type constructed and operated in conformity with the requirements of item 10r, grade A raw milk.

ITEM 7p. *Water supply.*—The water supply shall be easily accessible, adequate, and of a safe, sanitary quality.

ITEM 8p. *Hand-washing facilities.*—Convenient hand-washing facilities shall be provided, including warm running water, soap, and approved sanitary towels. The use of a common towel is prohibited.

ITEM 9p. *Sanitary piping.*—All piping used to conduct milk or milk products shall be "sanitary milk piping" of a type which can be easily cleaned with a brush. Pasteurized milk and milk products shall be conducted from one piece of equipment to another only through sanitary milk piping.

ITEM 10p. *Construction and repair of containers and equipment.*—All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. The manufacture, packing, transportation, and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner.

ITEM 11p. *Disposal of wastes.*—All wastes shall be properly disposed of.

ITEM 12p. *Cleaning and bactericidal treatment of containers and equipment.*—All milk and milk products containers and equipment, except single-service containers, shall be thoroughly cleaned after each usage. All containers shall be subjected to an approved bactericidal process after each cleaning and all equipment immediately before each usage. When empty and before being returned to a producer by a milk plant each container shall be effectively cleaned and subjected to bactericidal treatment.

ITEM 13p. *Storage of containers and equipment.*—After bactericidal treatment all bottles, cans, and other multi-use milk or milk-products containers and equipment shall be stored in such manner as to be protected from contamination.

ITEM 14p. *Handling of containers and equipment.*—Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled or operated in such manner as to permit contamination of the milk.

ITEM 15p. *Storage of caps, parchment paper, and single-service containers.*—Milk-bottle caps or cap stock, parchment paper for milk cans, and single-service con-

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tainers shall be purchased and stored only in sanitary tubes and cartons, respectively, and shall be kept therein in a clean dry place.

ITEM 16p. *Pasteurization.*—Pasteurization shall be performed as described in section 1 (L) of this ordinance.

ITEM 17p. *Cooling.*—All milk and milk products received for pasteurization shall immediately be cooled in approved equipment to 50° F. or less and maintained at that temperature until pasteurized, unless they are to be pasteurized within 2 hours after receipt; and all pasteurized milk and milk products shall be immediately cooled in approved equipment to an average temperature of 50° F. or less, as defined in section 1 (S), and maintained thereat until delivery.

ITEM 18p. *Bottling.*—Bottling of milk and milk products shall be done at the place of pasteurization in approved mechanical equipment.

ITEM 19p. *Overflow milk.*—Overflow milk or milk products shall not be sold for human consumption.

ITEM 20p. *Capping.*—Capping of milk and milk products shall be done by approved mechanical equipment. Hand capping is prohibited. The cap or cover shall cover the pouring lip to at least its largest diameter.

ITEM 21p. *Personnel, health.*—The health officer or a physician authorized by him shall examine and take a careful morbidity history of every person connected with a pasteurization plant, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. It such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or

any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

ITEM 22p. *Personnel, cleanliness.*—All persons coming in contact with milk, milk products, containers, or equipment shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

ITEM 23p. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk products shall have the name of the distributor prominently displayed.

The immediate surroundings of the milk plant shall be kept in a neat, clean condition.

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Grade B pasteurized milk.—Grade B pasteurized milk is pasteurized milk which violates the bacterial standard for Grade A pasteurized milk and/or the provision of lip-cover caps of item 20p and/or the requirement that grade A raw milk be used, but which conforms with all other requirements for grade A pasteurized milk, has been made from raw milk of not less than grade B quality, and has an average bacterial plate count after pasteurization and before delivery not exceeding 50,000 per cubic centimeter, as determined under sections 1 (S) and 6.

Grade C pasteurized milk.—Grade C pasteurized milk is pasteurized milk which violates any of the requirements for grade B pasteurized milk.

SEC. 8. *Grades of milk and milk products which may be sold.*—From and after 12 months from the date on which this ordinance takes effect no milk or milk products shall be sold to the final consumer or to restaurants, soda fountains, grocery stores, or similar establishments except[8]: *Provided*, That when any milk distributor fails to qualify for one of the above grades the health officer is authorized to revoke his permit,[9] or in lieu thereof to degrade his product and permit its sale during a temporary period not exceeding 30 days or in emergencies such longer period as he may deem necessary.

SEC. 9. *Supplementary grading prescribed and regrading authorized.*—If, at any time between the regular announcements of the grades of milk or milk products, a lower grade shall become justified, in accordance with sections 5, 6, and 7 of this ordinance, the health officer shall immediately lower the grade of such milk or milk

[8] See footnote 2, p. 2.
[9] See footnote 2, p. 2.

products, and shall enforce proper labeling and placarding thereof.

Any producer or distributor of milk or milk products the grade of which has been lowered by the health officer, and who is properly labeling his milk and milk products, may at any time make application for the regrading of his product.

Upon receipt of a satisfactory application, in case the lowered grade is the result of an excessive average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the health officer shall take further samples of the applicant's output, at a rate of not more than two samples per week. The health officer shall regrade the milk or milk products upward whenever the average of the last four sample results indicates the necessary quality, but not before the lapse of 2 weeks from the date of degrading.

In case the lowered grade of the applicant's product is due to a violation of an item of the specifications prescribed in section 7, other than average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the said application must be accompanied by a statement signed by the applicant to the effect that the violated item of the specifications has been conformed with. Within 1 week of the receipt of such an application and statement the health officer shall make a reinspection of the applicant's establishment, and thereafter as many additional reinspections as he may deem necessary to assure himself that the applicant is again complying with the higher grade requirements, and, in case the findings justify, shall regrade the milk or milk products upward, but not before the lapse of 2 weeks from the date of degrading.

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SEC. 10. *Transferring or dipping milk; delivery containers; handling of more than one grade; delivery of milk at quarantined residences.*—Except as permitted in this section, no milk producer or distributor shall transfer milk or milk products from one container to another on the street, or in any vehicle or store, or in any place except a bottling or milk room especially used for that purpose. The sale of dip milk is hereby prohibited.

All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized, and all raw milk and milk products sold for consumption in the raw state shall be placed in their final delivery containers at the farm at which they are produced. Milk and milk products sold in the distributor's containers in quantities less than 1 gallon shall be delivered in standard milk bottles or in single-service containers. It shall be unlawful for hotels, soda fountains, restaurants, groceries, and similar establishments to sell or serve any milk or milk product except in the original container in which it was received from the distributor or from a bulk container equipped with an approved dispensing device: *Provided*, That this requirement shall not apply to cream consumed on the premises, which may be served from the original bottle or from a dispenser approved for such service.

It shall be unlawful for any hotel, soda fountain, restaurant, grocery, or similar establishment to sell or serve any milk or milk products which have not been maintained, while in its possession, at a temperature of 50° F. or less.

No milk or milk products shall be permitted to come in contact with equipment with which a lower grade of milk or milk products has been in contact unless such equipment has first been thoroughly cleaned and subjected to bactericidal treatment.

Bottled milk or milk products, if stored in water, shall be so stored that the tops of the bottles will not be submerged.

It shall be the duty of all persons to whom milk or milk products are delivered to clean thoroughly the containers in which such milk or milk products are delivered before returning such containers. Apparatus, containers, equipment, and utensils used in the handling, storage, processing, or transporting of milk or milk products shall not be used for any other purpose without the permission of the health officer.

The delivery of milk or milk products to and the collection of milk or milk products containers from residences in which cases of communicable disease transmissible through milk supplies exist shall be subject to the special requirements of the health officer.

SEC. 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of.....may not be sold in the city of....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: *Provided,* That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

SEC. 12. *Future dairies and milk plants.*—All dairies and milk plants from which milk or milk products are supplied to the city of.....which are hereafter constructed, reconstructed, or extensively altered shall conform in their construction to the requirements of this ordinance for grade A dairy farms producing

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milk for consumption in the raw state, or for grade A pasteurization plants, respectively: *Provided,* That the requirement of a two-room milk house shall be waived in the case of dairies the milk from which is to be pasteurized. Properly prepared plans for all dairies and milk plants which are hereafter constructed, reconstructed, or extensively altered shall be submitted to the health officer for approval before work is begun. In the case of milk plants signed approval shall be obtained from the health officer and/or the State health department.

SEC. 13. *Notification of disease.*—Notice shall be sent to the health officer immediately by any producer or distributor of milk or milk products upon whose dairy farm or in whose milk plant any infectious, contagious, or communicable disease occurs.

SEC. 14. *Procedure when infection suspected.*—When suspicion arises as to the possibility of transmission of infection from any person concerned with the handling of milk or milk products, the health officer is authorized to require any or all of the following measures: (1) The immediate exclusion of that person from milk handling, (2) the immediate exclusion of the milk supply concerned from distribution and use, (3) adequate medical and bacteriological examination of the person, of his associates, and of his and their body discharges.

SEC. 15. *Enforcement interpretation.*—This ordinance shall be enforced by the health officer in accordance with the interpretations thereof contained in the 1939 edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office.[10]

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[10] See footnote 6, p. 7.

SEC. 16. *Penalty.*—Any person who shall violate any provision of this ordinance shall be fined not more than .....at the discretion of the court. Each and every violation of the provisions of this ordinance shall constitute a separate offense.

SEC. 17. *Repeal and date of effect.*—All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed; and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

SEC. 18. *Unconstitutionality clause.*—Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

Opinion of Attorney General of Michigan.

ORDINANCES.

(Milk)

A city ordinance providing that no license shall be granted to a milk producer whose dairy farm is more than thirty miles from the city and whose plant is located outside of the city, is violative of the constitutional rights of property and contract of a dealer whose plant is located outside the city. It is further discriminatory, and therefore invalid.

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o-5105 November 6, 1946

William DeKleine, M. D., Commissioner
Michigan Department of Health
Dewitt Road
Lansing 4, Michigan

Dear Dr. DeKleine:

We understand from your inquiry relative to the Michigan Model Milk Ordinance that the city of Midland adopted such ordinance and is now considering amending the ordinance by inserting a section to read as follows:

> "No license required by this section shall be granted except upon certification by the Health Officer, and no license shall be granted to a producer whose dairy farm is more than thirty miles from the city unless, in the opinion of the Health Officer, an emergency exists which necessitates a greater milk-shed area, or to a processer, bottler or distributor, not now engaged in said business, whose plant is located outside of the city."

You state that the city attorney of Midland does not feel inclined to approve this proposed section and that he will not do so without the recommendation of your department. You therefore question as to the advisability of making such a recommendation.

It is my opinion that such a provision in the ordinance, as is presented, would be discriminatory, violative of the constitutional rights of property and contract, and unenforceable.

While our Michigan Supreme Court has not passed precisely on this particular question, in the case of *Cook Coffee Co.* v. *Flushing*, 267 Mich. 131, it was said by the court:

> "It has been repeatedly held that a provision in an ordinance discriminating in favor of residents as against non-residents is in violation of constitutional prohibition and invalid." (Citing *Brooks* v. *Mangan*, 86 Mich. 576; *City of Saginaw* v. *Saginaw Circuit Judge*, 106 Mich. 32; and *Goldstein* v. *City of Hamtramck*, 227 Mich. 263.)

It has likewise been held in many jurisdictions that a classification in an ordinance based on location of its place of business is void. In the case of *Miller* v. *Williams*, 12 Fed. Supp. 236, a regulation of a city health commissioner similar to the ordinance under consideration was before the court. This regulation had been made under a city ordinance which ordinance had been upheld by the courts, and provided, among other things, that persons dealing in milk and cream in Baltimore City must obtain permits from the health commissioner. In this case, it was held that a regulation of a city health commission, prohibiting the sale of cream in the city for use in the manufacture of ice cream unless produced within a fifty mile radius of the city, was invalid as to shipper from another state as a direct burden on interstate commerce. The court further said in connection with this regulation:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the state of Maryland (in the absence of a state statute) outside the zone or from the point of view of being a direct burden upon interstate commerce."

Your further attention is called to the case of *Grant* v. *Leavell*, 259 Ky. 267, where the court held that the refusal to grant a permit for the sale of milk within the city, solely upon the ground that the applicant had constructed his milk plant since the ordinance had been

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passed and had not located it within the city where it would be more accessible for easy and frequent inspection, was held to be discriminatory, and therefore invalid. In the case of *Ex. Rel. Larsen* v. *Minneapolis*, 190 Minn. 138, it was held that a provision in the city ordinance which prohibits the sale of pasteurized milk or its products within the city, unless the milk has been pasteurized in a plant located within the city limits, violates the constitutional rights of property and contract of a dealer whose plant is located outside the city.

Very truly yours,

Foss O. Eldred,
Attorney General.

By John A. Bradshaw,
Deputy Attorney General.

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FILED
JAN 21 1948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

MOTION, AFFIDAVITS AND BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

CLAUDE D. STOUT,
Milton, Wisconsin,

GEORGE S. GEFFS,
JACOB GEFFS,
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INDEX.

PAGE

Motion to Deny Appellees' Motion to Dismiss Appeal 1

Affidavit of Lawrence Dyer 2

Affidavit of H. J. Burger 10

Argument 12

Introductory Statement 12

1. Appellees are not entitled to Dismissal of case upon their own ex parte action 13

2. Appellees have placed in Issue in this controversy the Rights of the public 16

3. The Parties to this Litigation and the Public are Entitled to Declaratory Relief 19

4. To Dismiss the appeal would result in an injustice to Appellant 21

CASES CITED.

Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N. W. (2d) 57, 66, 145 A. L. R. 1158, 1170 20

Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 348, 77 L. Ed. 730, 87 A. L. R. 1191 19

Payne v. Jones, 193 Okl. 609, 146 P. (2d) 113 17

Southern P. T. Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310 13

STATUTES CITED.

Federal Statutes, 28 U. S. C. A. Sec. 400; Mar. 3, 1911, C. 231, Sec. 274 d, as added June 14, 1934, C 512, 48 Stat. 955 and amended Aug. 30, 1935, C. 829, Sec. 405, 49 Stat. 1027 19

Wisconsin Statutes, Section 269.56 19

TEXTS CITED.

3 Am. Jur. "Appeal and Error" page 310, Sec. 733 17

132 A. L. R. page 1186 17

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No. 275

LAWRENCE DYER,

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CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

MOTION TO DENY APPELLEES' MOTION TO DISMISS APPEAL.

Now comes the appellant and moves the Court to deny appellees' motion to dismiss the appeal upon the ground that the cause is moot.

CLAUDE D. STOUT,
Milton, Wisconsin,
Attorney for Appellant.

GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK, of
McGOWAN, GEFFS, GEFFS & BLOCK,
Janesville, Wisconsin,
Of Counsel.

Dated: January 8, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

AFFIDAVITS IN OPPOSITION TO MOTION TO DISMISS APPEAL.

State of Wisconsin,
County of Rock—ss.

Lawrence Dyer, being first duly sworn upon oath deposes and says:

That he is the appellant in the above entitled action and that he makes this affidavit in opposition to the appellees' motion to dismiss the appeal on the ground that the above entitled suit has become moot.

That the suit has not become moot but that there is an actual controversy existing between parties upon the question of the right of the appellant to sell milk in the City of Beloit, which is pasteurized at a plant not located

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within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit.

That on December 15, 1947 the City of Beloit amended its ordinance to the extent of providing that the six mile limitation should not apply as to pasteurized milk within the course of interstate commerce and on the 16th day of December, 1947 issued to this appellant a temporary license which expires on June 30, 1948 "unless previously relinquished or revoked."

That the said license is "subject to the ordinances thereof and to the laws of this State."

That the said license and ordinances of the City of Beloit do not permit this appellant to sell or distribute milk within the course of intra-state commerce.

That the appellees in their brief served on the appellant on December 2, 1947 and filed in this Court maintain that they have a right to exclude all milk regardless of whether or not it arises within the course of interstate commerce that is pasteurized in plants not located within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; that the appellant contends in his brief that the City of Beloit has no such power under the Constitution of the United States; that the appellees still contend that the City of Beloit has such legislative power;

That the City of Beloit can repeal or change the amendment of December 15, 1947 at will and this appellant has no means or assurance that he will receive constitutional protection of his right of contract, property rights, investment and right to do business in the absence of a decision by this court; that a dismissal of this case will leave in full force and effect the decision of the Supreme Court of Wisconsin and the City of Beloit can amend

its ordinance at will and exclude the appellant from selling milk within the City of Beloit and appellant verily believes that the City of Beloit will immediately do so in the event this appeal is dismissed.

That a dismissal of this case would leave undecided the controversy between the parties as to the legislative right of the City of Beloit to arbitrarily exclude all milk pasteurized outside of the six mile zone.

That the amendment of December 15, 1947 was enacted by the City of Beloit for the purpose of avoiding a decision in this case; that the following history of the case demonstrates that new litigation would immediately arise:

That when this appellant first made inquiry in January of 1946 about securing a license to sell Dean Milk Company's milk in the City of Beloit that the following proceedings were had in the City Council of Beloit as reported by the Beloit Daily News, a newspaper published in Beloit, Wisconsin under the date of Feoruary 5, 1946:

Beloit Daily News, Tuesday, February 5, 1946
Farmers Ask Protection of Milk Market.

"Dairy farmers in the Beloit area are supplying this city with an adequate supply of good clean milk, their representatives told Beloit councilmen last night and, they asked that councilmen act to restrict the distribution of fluid milk here by outside interests.

Want Interests Protected.

Approximately 50 dairy farmers of this vicinity in Rock and Winnebago counties attended the council session held last night. They attended because of re-

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ports that a large distributor of fluid milk may be interested in locating a branch of its business here. The dairy representatives clearly explained they are of the pointed out, 'representatives of forced, and that their interests should be protected.

Ira Inman made the opening remarks for the delegation of farmers, 'We have here,' he pointed out, 'representatives of producers who furnish Beloit with fluid milk. We want to hold the fluid milk market here for ourselves.

'It is customary in Wisconsin to protect the market in Wisconsin cities, and when Wisconsin cities have been given good service, to discourage outsiders. Beloit is getting good, clean milk and good service.

'The issue sums up to this: we are fighting for interests we believe are ours.'

Milk Ordinance Is Strict.

Beloit has a milk ordinance which demands high quality milk for consumers here. It is strict in its demands for cleanliness, and the ordinance is made doubly effective by rigid inspections of producers and dairies by the city's inspection department and special sanitarians.

Answering the dairymen present last night, City Manager A. D. Telfer asserted 'We have the best milk ordinance in Wisconsin, and a strict inspection service.'

Explaining that there are limits to the area in which inspection service can be maintained, the ordinance calls for supplies from dairy farmers within a radius of six miles from Beloit. 'We intend to maintain and enforce the ordinance.' Telfer said.

Councilman A. J. Wagner remarked the Bacteria count in milk mounts if milk is transported a considerable distance. Councilman John Wootton questioned the ability of the ordinance to protect area

farmers, and City Attorney Clarence Haugan explained the radius limit. Councilman Maurice Christensen declared, 'We will go along 100 per cent with the dairymen in this area.'

Several Farmers Speak.

Dairy farmers and others who spoke briefly were Everett Sharpe, Winnebago county; George Holmes and Lyle Daniels of Turtle Grange; Fred H. Eddy, Beloit township farm bureau; Everett Phelps, Rockton township, and president of the Winnebago county farm bureau, and Frank McKearn. All expressed appreciation for the cooperation of councilmen.''

That thereafter the appellant filed an application for milk license and on June 3, 1946 his application was denied by the City Council of the City of Beloit on the sole ground that the milk which he proposed to deliver to the City of Beloit was not pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit.

That due to the fact that the licensing year begins on July 1 and in order to avoid objection that the appellant's action would be moot the appellant made another application on August 29, 1946 which application was rejected by the City Council of Beloit on August 30, 1946; that the appellant filed a petition for Writ of Mandamus on September 25, 1946; that the appellees filed a return to the petition for Writ of Mandamus and alleged in the said return that if a license was granted to the appellant it would be necessary for the City of Beloit to employ a third inspector merely for the purpose of performing the additional work due to the issuance of the license to the petitioner; that the supply of milk now delivered to the Beloit dairy plants far exceeds the local demands, and that a great part of the milk produced in the rural areas

immediately surrounding Beloit is shipped from Beloit to other places for consumption. (R. 4)

That the appellees contended in the Circuit Court that to grant the license to the appellant would cause unreasonable additional expense to the City of Beloit (R. 5); and that the Circuit Court denied the petitioner relief and held that the City had constitutional authority to exclude milk which was not pasteurized in plants located in the 6 miles zone from the intersection of State Street and E. Grand Ave. in the City of Beloit; this decision was rendered December 7, 1946.

That the appellant appealed the case to the Supreme Court of the State of Wisconsin; that in the appellee's brief filed with the Supreme Court of the State of Wisconsin the appellees stated:

> "Neither the purpose nor the effect of the ordinance is to erect a trade barrier, unless it can be argued that the restriction prevents the 'lone wolf' operator, who may buy milk at some pasteurization plant at a greater distance than six miles, from delivering it into Beloit for local consumption. The appellant in this case does not operate a pasteurization plant (Ap. 111). He testified that he intended to buy milk from a plant at Chemung, Illinois, a distance of twenty-five to thirty-five miles from Beloit (Ap. 110), and deliver the milk by truck to Beloit retail stores. If he received a license, there is nothing to prevent him from purchasing milk at a plant located at a greater distance from Beloit. It is obvious that, under the ordinance, he is the only kind of an operator who will be affected by the restriction. * * *
>
> There are at present eight plants furnishing milk to Beloit (Ap. 115). It would be unfair to require these plants to stand the additional expense of $2,400.00 to $3,000.00 per annum, merely for the purpose of permitting the appellant to haul a truck load of milk to the Beloit retail stores each day, and

it would be unfair to throw the burden of the additional expense upon the Beloit taxpayers. In addition, others like the appellant may wish to haul milk from other creameries even more distant from Beloit than Chemung, and from different directions. The cost to the City of inspecting the farms surrounding several distant pasteurization plants would become prohibitive. Unless there is to be a complete breakdown in the inspection service, which the city desires to render to its citizens, there must be some practical and realistic limitation."

That in this Court the appellees have filed a brief in which it is contended that to grant a license to the appellant would place an additional burden upon the City of Beloit in the amount of $3000.00 a year (Appellees' Brief page 14); and it is stated:

"If the City is to be compelled to open its doors to every such dealer, no matter from whom he purchases, or at what distance, there will be an inevitable break-down in the inspection service which the municipality has a duty to render to its citizens."

That the Supreme Court of Wisconsin upheld the validity of the 6 mile zone in its decision of June 10, 1947; that the appellant promptly appealed this case to the Supreme Court of the United States on July 30, 1947; that the appellant had a Statement of Jurisdiction and a Brief prepared by his attorneys for the benefit of this Court and at a considerable expense to himself which Statement and Brief were filed in this Court; that it was stipulated that the cause should be submitted to this Court upon the briefs of the parties; that the appellees served their brief upon the appellant on December 2, 1947; that this Court had taken this case under advisement and was considering its decision and without solicitation on the part of the appellant the appellees on December 15, 1947 amended the city milk ordinance to the effect that the 6 mile zone did not apply to milk within the course of interstate commerce.

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That prior to this amendment of December 15, 1947 the Court Librarian of this Court inquired of the City of Beloit as to the history and background of this ordinance; that upon information and belief the appellant believes and states the facts to be that the said inquiry has not been answered by the City of Beloit for the reason that it has no minutes or history of the origin of the part of the ordinance that is in dispute in this case; that it is common knowledge that the provision for the 6 mile zone was enacted for the purpose of protecting local plants and to exclude competition from outsiders.

That the question before this Court is one of great public interest; that a number of other cities in Southern Wisconsin, Northern Illinois, and Northern Indiana have enacted similar ordinances for the purpose of protecting local pasteurizing plants against outside competition.

That appellant has been engaged in litigation for a year and a half and with great expense to himself in attempting to obtain his constitutional rights; that the action of the City of Beloit at this late date is for the purpose of preventing the appellant from obtaining a decision upon the controversy now existing between the parties; that the appellant is a person of modest means and is compelled to work for his livelihood in supporting himself and his family; that this litigation has been expensive and the action upon the part of the City of Beloit over the period of the last two years has caused great damage to this appellant for which there is no redress in law because the City was acting within a governmental function; that to permit the City's action at this late date to avoid a decision in this case would work a great hardship upon this appellant and would take away from him all means of determining his Constitutional rights and protection of his right to engage in

business, and his property rights which are necessary in making a livelihood for his family.

Lawrence Dyer

Subscribed and sworn to before me this 6th day of January, 1948.

Jacob Geffs
Notary Public, Rock County, Wisconsin.

My Commission Expires: April 1, 1951.
(Seal)

State of Wisconsin,
Rock County—ss.

H. J. Burger being first duly sworn upon oath deposes and says:

That he is and has been for four years sanitary inspector for the City of Janesville, Wisconsin;

That on June 24, 1946 the City of Janesville, Wisconsin adopted in substance the model milk ordinance and code promulgated by the United States Public Health Service and prepared by direction of the Surgeon General of the United States and that said ordinance provides for reciprocal milk inspection;

That after the enactment of this ordinance a milk license was granted to a dealer who obtained his milk beyond what had formerly been the limits of routine inspection of the City of Janesville, Wisconsin;

That this ordinance has been beneficial in improving the sanitation, grade and quality of the milk sold in the City of Janesville, Wisconsin; and that reciprocal inspection has not subjected the citizens of Janesville, Wisconsin, to impure milk and has not shown any tendency toward a breakdown of inspection maintained by this municipality;

That the City of Janesville, Wisconsin, is a city of approximately the same size of Beloit, Wisconsin and located twelve miles north of Beloit, Wisconsin.

H. J. Burger

Subscribed and sworn to before me this 6th day of January, 1948.

Jacob Geffs
Notary Public for Rock County, Wis.

My Commission expires: April 1, 1951.
(Seal)

ARGUMENT.

INTRODUCTORY STATEMENT.

Appellees have moved to dismiss the appeal upon the sole ground:

> *"That because of the enactment of the amended ordinance, as aforesaid, the above entitled suit has become moot."*

The ordinance before amended read:

> "(2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit."

The ordinance after amendment read:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; provided, however, that this provision shall not be construed to prohibit the sale within the city of pure, wholesome, pasteurized milk within the course of interstate commerce, if it affirmatively appears that such milk shall be produced, processed and transported under laws, regulations or ordinances equivalent to the requirements of this ordinance. The health officer shall have the right to satisfy himself that the health officer having jurisdiction over the processing and transportation of such milk is properly exercising a regulatory control."

This amendment was enacted December 15, 1947, almost two years after appellant had first applied for a milk license, and after a year and one-half of litigation.

This amendment can be repealed or modified at any time by the City of Beloit.

The appellees have not confessed error in this Court; they still contend that the City's original ordinance (which can be restored at any time) was and is a valid piece of legislation. This was and is disputed by appellant. The controversy still exists although appellant may not need the same relief as originally prayed.

I.

Appellees are not entitled to dismissal of case upon their own ex parte action.

Appellees base their motion upon the sole ground that the enactment of the amended ordinance has caused the suit to become moot.

In *Southern P. T. Co.* v. *Interstate Commerce Commission*, 219 U. S. 489, 31 S. Ct. 279, 55 L. Ed. 310 this Court held that an appeal from a decree dismissing a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring a carrier to desist from granting a shipper an alleged undue preference over his competitors will not be dismissed as presenting merely a moot case because the time during which such order was by its express terms to continue in force has expired. On page 514 Mr. Justice McKenna stated:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is

hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.

This court has said a number of times that it will only decide actual controversies, and if, *pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones* v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Re. 611, and *Richardson* v. *McChesney*, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Re. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co.* v. *Clark* (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), *and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.*

In *United States* v. *Trans-Missouri Freight Asso. supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was

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an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the assertion therof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal, it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.

In *Boise City Irrig. & Land Co.* v. *Clark, supra,* the period for which a municipal ordinance fixed a

water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and *partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.*'

The motion to dismiss is denied." (Italics ours)

II.

Appellees have placed in issue in this controversy the rights of the public.

In the case at bar appellees state on page 12 of their brief:

> "If the city is to be compelled to open its doors to every such dealer (the appellant), no matter from whom he purchases, or at what distance, there will be an inevitable breakdown in the inspection service which the municipality has a duty to render to its citizens."

That assertion places in issue in this case the rights of the public. And as stated by Justice McKenna in the above quotation:

> "'Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.'"

Payne v. *Jones*, 193 Oklahoma 609, 146 P. (2d) 113 was a suit by a former owner to enjoin a tax resale by the County Treasurer. On page 116 of the Pacific Reporter the Court stated:

> "While it is a general rule in this jurisdiction, as well as other jurisdictions, that the Courts will not ordinarily decide moot questions, this rule applies generally to private rights, and not always as to them, *but an exception is recognized in cases involving public rights,* and another exception is sometimes made when the question of the assessment of costs is involved. 4 C. J. 575, §2383, notes 81, 82, 94; 4 C. J. S., Appeal and Error P. 1945, §1354, notes 24, 45; §Am. Jur. 308, 310, §733, notes 10 and 13." (Italics ours.)

In 3 Am. Jur. "Appeal and Error" page 310 Section 733 the authors state:

> "It is not every change in circumstances which might be said to render the case a moot one so as to require a dismissal of the appeal or error proceeding, however. *Thus there will be no dismissal where the question involved is a matter of public interest;* whenever the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights, even though the judgment, if affirmed, may not be directly enforceable by reason of a lapse of time or change of circumstances; where the parties, by stipulation, preserve their rights to a review proceeding; and where the appellant has become liable for costs or other damages if the case is not reversed." (Italics ours.)

In 132 A. L. R. at page 1186 the authors state:

> "The proposition that an appellate court may retain an appeal for hearing and determination if it involves questions of public interest even though it has become moot so far as the parties or the particular action are concerned or though the parties desire that it be dismissed, is supported, either directly or by implication, by the great weight of authority.
> • • •

Statements in the cases to this effect include the following:

> • • • 'A case is not moot where interests of a public character are asserted under conditions which may be immediately repeated, merely because the time for a particular order has expired.' *Van de Vegt* v. *Larimer County* (1936) 98 Colo. 161, 55 P. (2d) 703.
>
> • • • 'Even though litigation may not be effective in all respects because of circumstances arising after appellate proceedings are taken, the appellate court does not thereby lose jurisdiction of the cause, and it may be retained for the determination of questions *properly presented involving the duties and authority of public officials* that are of general interest to the public.' Syllabus by the court in *State ex rel. Railroad Comrs.* v. *Southern Teleph. & Constr. Co.* (1913) 65 Fla. 67, 61 So. 119.
>
> • • • 'Appellate courts, as a rule, decline to decide questions which have become moot • • • Where, however, the matter in controversy appears to be one of 'great public interest' *and involves the 'authority and power' of public officials, the appeal will not be ignored as a moot question.' North Dakota Wheat Growers Asso.* v. *Moore* (1925) 52 N.D. 904, 204 N. W. 834.

We submit that after battling the appellant through the State Courts and into the Supreme Court of the United States on the proposition that the City of Beloit had a duty to protect its citizens against impure milk and that the only method by which that protection could be maintained was by fencing out everyone beyond the six mile limit that the appellees are in no position to deny that important rights of the public are involved, and that it is their duty as trustee for their citizens to ascertain their constitutional authority as public officials in the matter.

III.

The parties to this litigation and the public are entitled to declaratory relief.

Both the Wisconsin Statutes (Wisconsin Statutes Section 269.56) and the Federal Statutes (28 U. S. C. A. 400; Mar. 3, 1911, C. 231, Section 274 d, as added June 14, 1934, C. 512, 48 Stat. 955 and amended Aug. 30, 1935, C. 829, Section 405, 49 Stat. 1027) provide that the Courts may declare the rights of the parties "whether or not further relief is or could be prayed."

The fact that the City of Beloit has granted Appellant a temporary license which would make unnecessary at the present time the issuance of a Writ of Mandamus does not deprive the Appellant and the public of their right to have their rights declared in this controversy.

Assume that appellant had started an action under the Wisconsin Declaratory Judgments Act instead of a Mandamus action no one would contend that the Appellees after proclaiming their right and duty to fence outsiders out for two years and without abandoning such contention could defeat the action by merely granting the appellant a temporary license. The fact that appellees amended their ordinance for the time being in order to execute the *coup d' etat* does not strengthen their position. The procedure is one of form rather than substance and one wholly within the power of the appellees to change at will.

In *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 348, 77 L. Ed. 730, 736, 87 A. L. R. 1191, brought under the Declaratory Judgments Act of Tennessee to secure a declaration that a tax levied on the storage of gasoline was invalid as applied to appellant, Justice Stone declared:

"But the Constitution does not require that the case or controversy should be presented by traditional forms of precedure, invoking only traditional remedies. * * * It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. * * * As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial."

In *Lafayette Dramatic Productions* v. *Ferentz*, 305 Mich. 193, 9 N. W. (2d) 57, 66, 145 A. L. R. 1158, 1170, the Court stated:

"During the pendency of this appeal defendants filed motion in this court to dismiss the appeal, alleging that the contract for the employment of musicians for the period of one year had been fully performed and that the questions involved had, therefore, become moot. In such motion defendants further alleged in substance that the parties had entered into a new contract that was being amicably fulfilled. Plaintiff filed answer to such motion, denying that the questions regarding the validity of the contract have become moot and in substance alleging that plaintiff has been forced by duress and coercion to continue the contract in question for a further period of time.

We have before us on this appeal only the questions relating to the original or first contract for one year. Notwithstanding such questions and the issues presented by this record might be considered moot,

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we deem the case of sufficient importance to warrant our decision, even though it may be in the nature of a declaratory decree."

IV.

To dismiss the appeal would result in an injustice to appellant.

Appellant's affidavit and the record show that appellees have a callous disregard for appellant's constitutional rights.

To dismiss this appeal means that the decision in the Supreme Court of Wisconsin would stand in full force and effect which subjects appellant and his business to the tender mercies of the appellees. In the Supreme Court of Wisconsin appellees belittled the appellant, and stated that Beloit should not be put to additional expense so that he could haul a truck load of milk to the Beloit retail stores each day. They refer to him as a "lone wolf."

It stands to reason that if appellees are sincere in their contentions that to permit appellant to do business in Beloit will result in great expense to the City and breakdown of its inspection standards, that upon the dismissal of this appeal appellant will be immediately excluded from selling milk in the City.

That the appellees' fear of additional expense and breakdown of its inspection service is groundless, is shown by the affidavit of the sanitary inspector for the City of Janesville, Wisconsin and the fact, which is common knowledge, that thousands of cities in America have relied safely for years upon reciprocal inspection. The appellees must be thoroughly acquainted with this fact

as it is common knowledge. In fact such can be inferred from their action of December 15, 1947. But appellees' conversion upon the eve of a decision of this Court is not indicative of good faith. Why all this anxious attempt at the last minute to get the appeal dismissed? How can a decision, regardless of results, hurt the appellees if they have no intention of not going back to the six mile limitation and excluding all outsiders? If appellees' conversion was genuine, why is intra-state commerce still excluded? Why the discrimination?

The answer is that an actual controversy still exists between the parties.

We submit that a dismissal of the appeal would make a mockery out of the law and inflict a great injustice upon the appellant.

We submit that the motion to dismiss should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

J. ARTHUR MORAN,
EARL J. CASKEY,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Nature of the case	1
State statute, the validity of which is involved	3
The Federal questions involved are unsubstantial	3
Motion to dismiss or affirm	11

Table of Cases Cited

Grant v. *Leavell* (Ky.), 259 Ky. 267, 82 S. W. (2d) 283	8
Hartford Accident & Indemnity Co. v. *Illinois*, 298 U. S. 155, 80 L. Ed. 1099, 56 Sup. Ct. 685	8
Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 Sup. Ct. 549	8, 10
LaFranchi v. *City of Santa Rosa* (Cal.), 8 Cal. (2d) 331, 65 Pac. (2d) 1301	7
Louisiana Pub. Serv. Commission v. *Texas & N. O. R. Co.*, 284 U. S. 125, 76 L. Ed. 201, 52 Sup. Ct. 74	8
3 McQuillan Mun. Corp. (2d Ed.) P. 110	6
Meridian v. *Sippy* (Cal.), 54 Cal. App. (2d) 214, 128 P. (2d) 884	7
Pacific States Box & Basket Co. v. *White*, — U. S. —, 80 L. Ed. (Adv. 133), 56 Sup. Ct. 159	8
Prescott v. *Borger* (Tex. Civ. App.), 158 S. W. (2d) 578	8
Sheffield Farms Co., Inc. v. *Seaman* (N. J.), 114 N. J. L. 455, 177 A. 372	7
Southern Express Co. v. *Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410	8
State ex rel. Larson v. *City of Minneapolis* (Minn.), 190 Minn. 138, 251 N. W. 121	7
State v. *C., M. & St. P. R. Co.*, 136 Wis. 407, 117 N. W. 686	9
Wadham's Oil Co. v. *Tracy*, 141 Wis. 150, 123 N. W. 785	9

STATUTES CITED

	Page
Constitution of the United States:	
Section 8 of Article I	8
Fourteenth Amendment	8
Judicial Code of United States, Sec. 244(a)	10
Ordinances of City of Beloit:	
Sec. 8.09 (X) (2)	2, 3, 8
Sec. 8.09 (X) (6)	

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, R. H. CALLAND, AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN,

Appellees

STATEMENT OPPOSING JURISDICTION

I

Nature of Case

The Beloit, Wisconsin, milk ordinance, which is under attack by the petitioner in this case, regulates the distribution and sale of whole milk for direct human consumption in the City of Beloit (R.17). It does not regulate the production of milk produced on farms for use outside the City of Beloit. At the time of the trial, between one hundred six

and one hundred eleven farms were producing Grade A milk for consumption in the city, while three hundred nineteen farms in the same area were producing Grade B milk for sale and consumption elsewhere (R.15). Under Sections 97.31-97.37, Wisconsin Statutes, the Wisconsin Department of Agriculture leaves to the City of Beloit the responsibility of protecting the purity of Grade A milk, but assumes the responsibility for the enforcement of regulatory provisions pertaining to Grade B milk. The city, therefore, exercises regulatory control over approximately one-fourth of the milk produced in the area prescribed by its ordinance. The state exercises regulatory control over the balance. Approximately three-fourths of the milk produced in the area prescribed by the ordinance is, therefore, not subject to it. The ordinance provides health precautions and sanitary regulations, as well as inspection of the pasteurization plants, and also for periodical inspection of all farms supplying such plants (R.27). No attack is made upon any provision of the ordinance, except Sec. 8.09 (X) (2), which provides:

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the city of Beloit."

The state line of Wisconsin and Illinois is the south city limits of the City of Beloit, Wisconsin. The area described in the ordinance extends almost six miles into Illinois. Milk produced on farms and pasteurized in plants in Illinois and within the area prescribed by the ordinance may be, and is, furnished to the City of Beloit for direct consumption (R.76). The villages of Rockton and Roscoe, Illinois, are within the area.

The petitioner stated in his application for a license and on the trial that he intended to distribute milk in his

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truck to retail merchants in the City of Beloit for consumption therein, purchasing such milk from a pasteurization plant at Chemung, Illinois,—a distance of between twenty-five and thirty miles from the City of Beloit (R. 12). It was stipulated in court that one hundred ninety-seven farms located in Illinois and Wisconsin supply milk to this Chemung plant (R.12). The granting of a license to the petitioner would, therefore, have added a pasteurization plant and almost two hundred farms to the number to be inspected by the two sanitarians employed by the City of Beloit. It was proven at the trial that these additional duties would entail the employment of an additional inspector, at a cost of at least $2,400.00 per annum (R.17).

After the denial of a license, solely because the pasteurization plant from which the petitioner was to bring milk for direct consumption in Beloit was outside the prescribed limits of Section 8.09 (X) (2) of the Ordinance, petitioner brought mandamus in the Circuit Court for Rock County, Wisconsin, to compel the city to issue him a license. The Circuit Court dismissed his petition for mandamus. Upon appeal, the Supreme Court of Wisconsin, on June 9, 1947, entered judgment affirming the decision of the lower court. It is conceded that the federal questions now raised in this case were raised and urged throughout all the proceedings in the state courts.

II

Question Involved Is Unsubstantial

It is denied that the Supreme Court of Wisconsin held in this case that the production and sale of any wholesome food may be arbitrarily restricted to that produced and processed in specified territories surrounding a city to an amount deemed capable of supplying its population.

The Trial Court, in its opinion, expressly repudiated any such doctrine in the following language:

> "Zoning ordinances are valid if reasonable and not intended as a trade barrier. They must also be reasonable and not arbitrary, capricious or discriminating. I am aware that the mere fact that a City already has a sufficient number of milk dealers, or has an adequate supply of milk, would present no valid reason for the refusal of a license to sell milk in the City, as that would then be an unfair and illegal interference with property and constitutional rights."

The following excerpts from the opinion of the Supreme Court of Wisconsin in this case repudiate any implication that the Court held that a city may impose trade barriers upon the production and processing of milk:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption."
>
> "The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it."
>
> "The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three-fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is

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ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to nearby plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk."

"Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance."

"Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

The facts in this case equally repudiate the assertion in petitioner's brief that the intent or effect of the ordinance is to create a trade barrier. The City of Beloit is in the center of a large milk-producing area. It produces three times as much milk as the inhabitants consume. A large number of milk plants located in this area surround the City of Beloit. There is enough business to justify additional plants, as the Supreme Court of Wisconsin observed

in its opinion. While the ordinance does not provide that the farms supplying pasteurization plants be within the six-mile zone, all farms supplying the plants furnishing milk to the city are within the zone, because farmers, as a matter of convenience and economy, usually haul their milk to the nearest plant, and they have a wide choice in this respect (R. 40). Had the City Council of Beloit intended to limit the pasteurization plants to a number sufficient merely to supply the demands of its citizens, it would have circumscribed a line much closer to the city. It would not have drawn about the city a circle whose diameter is twelve miles. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance, in the light of these conditions, creates a prima facie presumption that it is reasonable. 3 McQuillan, Mun. Corp. (2d ed.) P. 110. In view of the foregoing facts, the ordinance cannot be said to be arbitrary, capricious or unreasonable. It designates an area which is not detrimental to the business interests of any existing or proposed pasteurization plant. Petitioner has not attempted to prove, and the record is devoid of any proof, that any such plant, no matter where located, has lost its Beloit market as a result of the ordinance, or that any such plant, outside the area, has sought to enter the City of Beloit market since its passage. It is evident that the city, in prescribing a restrictive area, worked no injustice to the interests of any existing pasteurization plant, or of any plant that might be operated in the foreseeable future. At the same time, acting under its police powers, it insured to its citizens an effective protection of their health by efficient inspection of both plants and farms.

It cannot be soundly argued that the ordinance creates a trade barrier because the petitioner cannot comply with it. If he is permitted to purchase and deliver milk into

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the City for sale for human consumption, a distance of twenty-five to thirty miles, then others will have the right to haul from greater distances and from different directions—and, incidentally, from localities where there may be no local inspection at all, although this last point is of no importance, as the City of Beloit is under no compunction to rely upon other cities to solve its local problems. Under these conditions, there would no doubt be a partial, if not a total, breakdown in the inspection service of the city. The selfish business interests of a lone operator are not to be compared to the health of an entire community.

We find no case adjudicated by a court of last resort which is in point on the facts. Each case must be judged upon its own merits. The case of *Sheffield Farms Co., Inc.* v. *Seamen* (N. J.) 114 N. J. L. 455, 177 A. 372, cited in petitioner's statement, is not comparable. In this case, despite the fact that the plaintiff had a State of New Jersey license to sell milk anywhere in the state, and had complied with both city and state laws, it was arbitrarily refused a license by the Board of Health of the City of Perth Amboy, because the city had enough milk dealers. In both the cases of *State ex rel. Larson* v. *City of Minneapolis* (Minn.) 190 Minn. 138, 251 N. W. 121, and *LaFranchi* v. *City of Santa Rosa* (Cal.) 8 Cal. (2d) 331, 65 Pac. (2d) 1301, the city ordinances in question gave no consideration to the supply of milk available in the area, and provided for no inspection of farms supplying pasteurization plants. Section 8.09 (x) (6) of the Beloit ordinance provides for a periodical inspection of farms supplying milk to the pasteurization plants in the Beloit area (R. 27). Both of these ordinances arbitrarily and capriciously created trade barriers. The same observation is to be made of the cases of *Meridian* v. *Sippy* (Cal.) 54 Cal. App. (2d) 214, 128 P.

(2d) 884, and *Grant* v. *Leavell* (Ky.) 259 Ky. 267, 82 S. W. (2d) 283. In the case of *Prescott* v. *Borger* (Tex. Civ. App.) 158 S. W. (2d) 578, also cited in petitioner's statement, it was held that an ordinance prohibiting the sale of milk in a city, unless it had been pasteurized inside the city, was void because it transcended the general statutes of the state in regard to the regulation of the sale of milk.

It is respectfully submitted that the cases cited in petitioner's statement to show that Section 8.09 (x) (2) of the Beloit ordinance is in violation of Section 8 of Article I of the Constitution of the United States are not applicable to this case. The grant of power over interstate commerce in the Constitution, of its own force, establishes the immunity of interstate commerce from the control of the states with respect to those subjects embraced in the grant, which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. Such subjects are national in character, and require uniformity of regulation affecting alike all the states. In such matters, Congress can alone provide the needed regulations. *Southern Express Co.* v. *Byers*, 240 U. S. 612, 60 L. ed. 825, 36 S. Ct. 410; *Louisiana Pub. Serv. Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74.

In matters, however, admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their own jurisdictions until Congress sees fit to act, even though the enactments may have an incidental effect upon interstate commerce. *Pacific States Box & Basket Co.* v. *White*, — U. S. —, 80 L. Ed. (Adv. 133), 56 S. Ct. 159; *Hartford Accident & Indemnity Co.* v. *Illinois*, 298 U. S. 155, 80 L. Ed. 1099, 56 S. Ct. 685; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549.

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The Beloit ordinance does not prohibit the delivery of milk from pasteurization plants in Illinois. The city lies on the Wisconsin-Illinois state line. A large area in Illinois, including the villages of Rockton and Roscoe in that state, lies within the area defined by the ordinance. Two pasteurization plants located at Rockton and Roscoe deliver milk to the city for local consumption, in compliance with the ordinance. Farmers living both in Illinois and in Wisconsin deliver their milk to pasteurization plants supplying the city. No purpose to close the door to Illinois milk can be read into the ordinance.

It is neither the purpose nor the effect of the ordinance to prohibit or restrict interstate commerce, or to discriminate against the producers of milk in any state other than Wisconsin. We assume that the question would not be raised, except for the fact that the city of Beloit does adjoin the State of Illinois. The production of milk and its delivery are not acts of commerce, which from their nature admit only of national control. The flow of pure milk into a city is a local problem, with which Congress cannot deal effectively, and has not sought to deal. The City of Beloit, therefore, was free to act in the exercise of its police powers to protect its citizens, even though a part of the milk coming into the city does, in fact, come from another state. The ordinance is local in character and affects interstate commerce incidentally. There is no violation of the interstate commerce clause of the Federal Constitution. *State* v. *C. M. & St. P. R. Co.*, 136 Wis. 407, 117 N. W. 686; *Wadham's Oil Co.* v. *Tracy*, 141 Wis. 150, 123 N. W. 785.

We submit that the right of the City of Beloit to pass and enforce an ordinance restricting the sale of milk from pasteurization plants located within six miles of a point within the city is sustained by the cases above cited. (See,

also, *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549.)

It is respectfully submitted that no substantial question exists in this case, and that this Court should not take jurisdiction of this appeal under Section 237 (a) of the Judicial Code, as amended.

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SUPREME COURT OF THE UNITED STATES

October Term, 1947, No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, AS CITY MANAGER OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; R. H. CALLAND, AS CITY CLERK OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; AND STANLEY J. GOLDSCHMIDT, CITY SANITARIAN OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN, *Appellees*

MOTION TO DISMISS OR AFFIRM

Now come the appellees, City Council of the City of Beloit, Rock County, Wisconsin; A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin; and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, and move that the appeal of the said Lawrence Dyer, appellant, be dismissed, or, in the alternative, that the judgment of the Supreme Court of the State of Wisconsin, in this case, be affirmed.

J. ARTHUR MORAN,
Delavan, Wisconsin,
Attorney for Appellees.

EARL J. CASKEY,
of the firm of Arnold, Caskey & Robson,
Beloit, Wisconsin,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 275.

LAWRENCE DYER,
Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,
Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF.

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Attorney for Appellees.

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Of Counsel.

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SUBJECT INDEX.

	Page
Opinion of the courts below	1
Statement of jurisdiction	2
Supplemental statement of the case	2
Summary of argument	4
Argument	6
1. The maintenance of a pure milk supply requires inspection by the city on the farms, at the plants and at the points of delivery in the city	6
The inclusion in the ordinance of a prescribed area for the location of pasteurization plants supplying the city affects but few plants outside the area	7
The effect of the ordinance upon interstate commerce is insignificant and incidental, and the ordinance is local in character and non-discriminatory	8
The ordinance does not violate the interstate commerce clause of the United States Constitution	10
2. The facts in this case do not justify the claim that the ordinance is arbitrary, discriminatory, or that it was drawn without reasonable relation to a proper legislative purpose	10
The cases cited in appellant's brief are not in point on the facts	12
The ordinance does not violate the Fourteenth Amendment to the United States Constitution	17

Cases Cited.

Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577	10
Grant v. Leavell, 259 Ky. 267, 82 S. W. (2d) 283	15

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086 10
Hygrade Provision Co. v. Sherman, 266 U. S. 497, 69 L. ed. 402, 45 S. Ct. 141 10
Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529 9
LaFranchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301 14
Lemke v. Farmers Grain Co., 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244 9
Meridian v. Sippy, 54 Cal. App. (2d) 214, 128 P. (2d) 884 15
Mintz v. Baldwin, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611 10
Nebbia v. New York, 291 U. S. 502, 517, 78 L. ed. 940, 945, 54 S. Ct. 505 .....9, 16
Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273 10
Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154 10
Prescott v. City of Borger (Tex. App.), 158 S. W. (2d) 578 15
Shafer v. Farmers Grain Co., 268 U. S. 189, 69 L. ed. 909, 45 S. Ct. 481 9
Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49..... 9
Sheffield Farms Co., Inc., v. Seaman, 114 N. J. L. 455, 177 A. 372 14
State ex rel. Larson v. City of Minneapolis (1933), 190 Minn. 138, 251 N. W. 121 .....12, 13

Statutes.

26 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a) 2

Texts.

3 McQuillen Mun. Corp. (2d ed.), p. 110, Sec. 951 15

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF.

OPINION OF THE COURTS BELOW.

The opinion of the Supreme Court of the State of Wisconsin (R. 26030) is reported in 250 Wis. 613, 27 N. W. (2d) 733; the opinion of the Circuit Court for Rock County is not officially reported, but is found in the record at pages 4-6.

STATEMENT OF JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended [36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)], from a final judgment of the Supreme Court of Wisconsin entered the 10th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment or decree in a suit in the highest court of a state

> "Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (x) (2) of the Beloit City Ordinances.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 10, 1947 (R. 26-30), and an appeal was allowed by that court to this Court on July 30, 1947.

SUPPLEMENTAL STATEMENT OF THE CASE.

The Beloit milk ordinance, which is under attack in this case, does not regulate the production of milk produced in the six mile area surrounding Beloit, unless the milk is produced for human consumption in the city (R. 13). At the time of the trial, not more than one hundred eleven farms were producing Grade A milk for consumption in the city, while three hundred nineteen farms were producing Grade B milk for use in manufactured products, such as ice cream mix (R. 11). Under Sections 97.31-97.37,

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Wisconsin Statutes, the State Department of Agriculture assumes the responsibility of protecting the purity of Grade B milk, but leaves the responsibility of regulating the production and sale of Grade A milk to the city (R. 30). The City of Beloit, therefore, exercises regulatory control over only approximately one-fourth of the milk produced in the six mile area prescribed by the ordinance. The ordinance does not prescribe any limitation upon the locations of farms producing Grade B milk, or upon the locations of the dairies or creameries receiving such milk (R. 13). Furthermore, it does not prescribe any limitations upon the locations of farms producing Grade A raw milk for consumption within the city, or upon the dairies or creameries receiving such milk, but it does regulate its production and sale (R. 13). The only geographical limitation contained in the ordinance pertains to the location of pasteurization plants (R. 22). The ordinance does not place any limitations, however, upon the locations of farms supplying milk to these plants.

The state line of Wisconsin and Illinois is the south city limits of the City of Beloit, Wisconsin. The ordinance prescribes a circle around the city with a diameter of twelve miles within which pasteurization plants furnishing milk to the city for human consumption must be located (R. 22). This area extends almost six miles into the State of Illinois. Pasteurization plants delivering milk into the City of Beloit for consumption by the residents exist in both states within the area prescribed.

SUMMARY OF ARGUMENT.

1. The requirement of the Beloit Ordinance that Pasteurization Plants must be located within a prescribed area is not a violation of the constitutional provision giving Congress the power to regulate commerce among the several states.

The purpose of the Beloit milk ordinance is to insure the purity of pasteurized milk sold in the city by periodical inspections of the farms and dairy herds supplying milk to pasteurized plants by inspections of such plants and various chemical and physical tests of the milk itself. To insure an efficient inspection service, the ordinance provides that pasteurization plants furnishing milk to the residents of the city for consumption shall be within a prescribed area.

The ordinance clause providing for such prescribed area does not affect approximately three-fourths of the milk produced in the area. Such milk is used either in the form of raw milk, or for manufacture into ice cream or other milk products. Because of the location of the City of Beloit and the costs, under competitive conditions, of doing business, pasteurization plants in any state, except Illinois, are not influenced by the ordinance. Furthermore, plants in Illinois can have no interest in the Beloit market for sale to consumers, unless they are located a short distance from the city, and no interest in selling pasteurized milk to Beloit retail stores, if they are located at any considerable distance from the city. The prescribed area extends into Illinois, and pasteurization plants in this state, but within the area, deliver milk for sale in the city.

The impact of the ordinance upon the free flow of commerce among the states is insignificant, incidental and

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non-discriminatory. It is essential to the protection of the citizens of the city against the danger of impure milk. The ordinance has a reasonable relationship to proper legislative object. It does not violate the interstate commerce clause of the United States Constitution.

2. **The provision of the Beloit ordinance providing that pasteurized milk sold within the city for human consumption be pasteurized within a prescribed area, is not in violation of the Fourteenth Amendment to the United States Constitution.**

The City of Beloit created the prescribed area upon the basis of the requirements of efficiency with a reasonable relation to the legislative purpose.

The cases cited in appellant's brief are not in point on the facts. The ordinance does not violate the Fourteenth Amendment to the United States Constitution.

ARGUMENT.

I.

The Requirement of the Beloit Ordinance That Pasteurization Plants Must Be Located Within a Prescribed Area Is Not a Violation of the Constitutional Provision Giving Congress the Power to Regulate Commerce Among the Several States.

The maintenance of a pure milk supply requires more than bacterial counts, miscroscopic examinations and other chemical and physical tests in the city where milk is sold and consumed. The United States Public Health Service Milk Ordinance, a model ordinance set forth in full in the appendix to appellant's brief on page 37, is a recognition of this obvious truth. The model ordinance provides for periodic visits to farms by health officers to grade the milk produced thereon, to inspect herds for disease, to cull diseased cows from the herds, to inspect dairy barns and cow yards, as well as the actual farm dairy operations, in order to insure the necessary degree of sanitation and cleanliness at the source of supply. The model ordinance also provides for the inspection of creameries and dairy plants. It contains many provisions designed to insure purity of milk before delivery to the city. Generally speaking, the Beloit milk ordinance contains similar provisions (R. 13).

The City Government of Beloit has the duty to insure a safe milk supply to its residents by regulation and inspection of the farms, of the dairies and at the places of sale in the city. The question is whether, in the exercise of this duty, the city has placed too great a burden upon the free flow of commerce among the states.

The area prescribed by the ordinance produces approximately three times as much milk as the residents of the

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city consume, and is shipped elsewhere (R. 11). This surplus is not subject to the ordinance clause under attack in this case. Furthermore, Grade A raw milk sold in the city for consumption is not subject to the same clause. Farms producing milk for consumption in the city may be located anywhere, in any state. The ordinance limits only the locations of pasteurization plants.

The facts in this case may be further narrowed. The City of Beloit lies about midway between the western and eastern boundaries of the state and several hundred miles from the northern boundary. No pasteurization plant located in any state, other than Illinois, can, therefore, have any interest in the Beloit market for the sale of pasteurized milk. The necessity of making long daily hauls to the homes and retail stores of the city makes the cost prohibitive under competitive conditions, and involves too costly and difficult technical problems in the preservation of a highly perishable commodity. Actually, therefore, the ordinance cannot be said to interfere in any manner or degree with the flow of milk from any state, except Illinois.

For the same reasons, the owner of an Illinois pasteurization plant situated at any considerable distance from Beloit will have no interest in entering the Beloit market for direct and daily sale. It is significant in this respect that the Dean Milk Company, which operates a pasteurization plant at a distance of thirty to thirty-five miles from the city, has made no effort to procure a license for direct sale to consumers in the city. It is equally significant that the petitioner has made no such application, but proposes merely to deliver pasteurized milk to retailers. Furthermore, the petitioner makes no showing that any pasteurization plant at any distance from the city, but lying outside the prescribed zone, has sought to sell milk directly to the consumers in the city. It is self-evident that the

ordinance places no practical restraint upon any pasteurization plant, wherever located, with respect to direct sale of pasteurized milk to consumers in the city.

It can also be said that the ordinance can have no influence upon the business of pasteurization plants selling to Beloit retail stores, unless they are situated close enough to the City of Beloit to make the daily hauls necessary to maintain such a business. So far as the record shows, the petitioner is the only one, outside the prescribed area, who has sought to enter the Beloit market. Beloit is a small city. Under these circumstances, the impact of the ordinance upon interstate commerce is so small that it is insignificant.

The ordinance in no manner sets up a preference or discrimination. It applies equally to pasteurization plants outside the prescribed area, whether those plants are in Wisconsin or any other state. It does not discriminate between plants located in Illinois, but within the prescribed area, and those located within Wisconsin. All of these plants can and do deliver pasteurized milk to the city. It treats alike all plants outside the prescribed area.

It is neither the purpose nor effect of the ordinance to prohibit interstate trade. The ordinance seeks merely to deal with an essentially local problem, with which Congress cannot deal effectively, and has not sought to deal. It affects interstate commerce incidentally. If the City of Beloit were located at some considerable distance from the Illinois-Wisconsin line, there would be no occasion to invoke the interstate commerce clause, because no dealer would have any interest in shipping pasteurized milk to the city.

If the city cannot give to its citizens the protection insured to them under the ordinance, it must fail in its

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duty to protect their health against impure milk. It is no answer to say that the city may rely upon the inspections of health officers elsewhere. While in the case at bar inspections are made by the Dean Milk Company, as well as by officials of the City of Chicago, there is no assurance that the petitioner will continue to acquire his milk from the Dean Milk Company, or that he may not acquire it from another source which is not subject to local inspection. If the petitioner is entitled to a license without complying with the clause under attack, then anyone else outside the prescribed area is also entitled to a license, no matter whether the pasteurization plant, or the farms upon which he relies for his product, are subject to inspection or not.

While admittedly a municipality cannot prohibit the importation of a lawful article of commerce from another state, as said in the case of Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49, where, as in this case, the impact upon interstate commerce is slight and insignificant, and the ordinance in question is reasonably adapted to the legitimate end of protecting the health of a small community, it is submitted that the city may exercise its police power, in the absence of any regulation by Congress.

The purpose of the Beloit ordinance is to protect the health and welfare of the citizens of Beloit, Wisconsin. It does not discriminate against products coming into the state in interstate commerce, and it is concerned with a problem which is predominantly local. Nebbia v. New York, 291 U. S. 502, 517, 78 L. ed. 940, 945, 54 S. Ct. 505; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Lemke v. Farmers Grain Co., 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244; Shafer v. Farmers Grain Co., 268 U. S. 189, 69 L. ed. 909, 45 S. Ct. 481.

A municipality may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health and general welfare, even though interstate commerce is affected as an incident to such regulation. Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154, 5 Inters. Com. Rep. 590; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 69 L. ed. 402, 45 S. Ct. 141; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577; Mintz v. Baldwin, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611. The Beloit ordinance has a real and substantial relation to the object of protecting public health. It does not invade the field in which Congress has the exclusive power to act. It seeks merely to solve a local problem.

It is submitted that, under the circumstances of this case, the provision in the Beloit ordinance for a six mile zone is not in violation of the interstate commerce clause of the United States Constitution.

II.

The Provision of the Beloit Ordinance Providing That Pasteurized Milk Sold Within the City for Human Consumption Be Pasteurized Within a Prescribed Area, Is Not in Violation of the Fourteenth Amendment to the United States Constitution.

As pointed out in the preceding section of this brief, Beloit is in the center of a great milk producing area. Production is so great that approximately three-fourths of the milk produced in the area is processed for use in manufacturing ice cream and other commodities, and is not consumed in the city itself (R. 11). Such milk is not pasteurized and, therefore, is not subject to the provision of

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the ordinance (R. 22). There are eight pasteurization plants within the prescribed area (R. 12). By far the greater part of the milk pasteurized in these plants is delivered directly to Beloit homes. A smaller part is delivered to Beloit stores for sale at retail. When and if it becomes economically profitable for another pasteurization plant to serve the residents of the city, it will find its supply of milk within the area more than adequate. There is nothing in the record to indicate that any pasteurization plant has been deprived of a business opportunity by the ordinance. There is no evidence that such a plant, outside the area, can deliver pasteurized milk directly to the consumers in the city at a profit, or that any such plant has sought to do so. The high cost of purchasing and using refrigeration trucks to haul milk directly to Beloit consumers in competition with those who use ordinary trucks because of the short distances to be traveled obviously makes such a venture unprofitable. Apparently, it is equally unattractive for a pasteurization plant outside the area to haul milk to the retail stores in Beloit. The Dean Milk Company, from which the petitioner states he will purchase milk, does not seek to do so. The petitioner himself does not operate a plant (R. 9). He proposes merely to purchase the milk and to truck it to the city for resale to local stores (R. 9).

The Beloit ordinance requires periodical inspection of both plants and farms (R. 22). If petitioner is granted the license requested, it will be necessary for the city to make periodical inspections of an additional plant and approximately one hundred ninety-seven (197) additional farms (R. 8). This will require the employment by the city of an additional inspector at a cost to the city of about $200.00 per month plus traveling expenses (R. 13). It is not a valid answer to this argument that if one more pasteurization plant were to be located within the prescribed area, an additional inspector would be necessary, in any

event. The present plants fully supply the demand, and there is no reason to believe that any plant will be added to the present number in the foreseeable future.

There is no assurance that the petitioner, once granted a license, may not purchase milk from a different plant and from a greater distance. Furthermore, if the ordinance is not valid, some other dealer may wish to enter the Beloit market, and thus compel city inspection of many more farms, lying at unknown distances and in different directions from the city. On the basis of the record in this case, it can fairly be said that the ordinance imposes no restriction upon any dealer in pasteurized milk, except the small jobber who buys and hauls milk to the retail stores of the city. If the city is to be compelled to open its doors to every such dealer, no matter from whom he purchases, or at what distance, there will be an inevitable breakdown in the inspection service which the municipality has a duty to render to its citizens.

The Supreme Court of Minnesota, in the case of State ex rel. Larson v. City of Minneapolis (1933), 190 Minn. 138, 251 N. W. 121, said with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

> ". . . It is obvious that adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed. . . ."

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A reasonable exercise of the police power does not create a trade barrier. The Beloit ordinance, in light of the attending circumstances, is reasonable, not arbitrary. It contains many clauses designed and enacted to protect the health of the people against dangers and disease resulting from impurities in milk. These clauses will be unavailing unless there can be an efficient enforcement of them. When their enforcement becomes difficult and too costly, laxity, if not failure, will follow, and the people of the city will not have the protection which the city owes to them in the interest of community health.

The case of State ex rel. Larson v. City of Minneapolis, supra, cited by the appellant, is not in point. In this case a city ordinance of Minneapolis provided that no license should be issued to a pasteurization plant located outside the city after December 31, 1932. At the time of the passage of the ordinance, Larson maintained a pasteurization plant at Cologne, Minnesota. The Minneapolis ordinance provided merely for the inspection of pasteurization plants, and did not provide for the inspection of farms delivering milk to such plants. The Supreme Court of Minnesota recognized that consideration of efficiency, convenience and cost of inspection are proper to be taken into account in determining the question of the reasonableness of such an ordinance. The court stated that it is obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly and too likely to be ineffective to be practicable. It concluded, however, that in the particular case the additional cost of inspection was not so great as to justify the prohibition. In the case at bar, the ordinance under consideration requires not merely the inspection of pasteurization plants, but also the inspection of farms servicing said plants. As stated above, it will be necessary, if a license is granted to the petitioner, for the City of Beloit

to employ an extra man, at a cost ranging up to $3,000.00 a year.

The case of Sheffield Farms Co., Inc., v. Seaman, 114 N. J. L. 455, 177 A. 372, is likewise not in point. In this case the ordinance of Perth Amboy, New Jersey, did not provide for any limits upon the location of pasteurization plants, but the City Health Department sought to exercise a discretion in refusing to grant the petitioner a license upon the ground that it had insufficient personnel to make the additional inspections. The petitioner had a license to sell and deliver milk in all of New Jersey. The Court held that under the ordinance no discretion in granting or refusing to grant a license was vested in the Health Department. The court also pointed out that the Legislature of New Jersey, by state law, had provided for additional funds. The court also came to the conclusion that the city had taken the position that it had enough milk dealers, and that such an attitude was arbitrary and capricious.

In the case of LaFranchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301, the milk ordinance under consideration provided merely that it was unlawful for any person to sell milk within the City of Santa Rosa for human consumption unless it was pasteurized in the city. Plaintiff's pasteurization plant was located about five miles outside the city. The ordinance did not provide for the inspection of farms delivering milk to the city. In addition, the City Health Inspector of Santa Rosa did, in fact, inspect the plaintiff's raw milk plant, and as an employee of a nearby city also inspected the plaintiff's pasteurization plant. The fees paid by milk dealers in Santa Rosa were ample to cover the cost of inspection of the additional pasteurization plant, and, in fact, no additional inspection was required. Under these circumstances, the California Court quite properly held that the

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prohibition had no relation to any legislative purpose, and that the ordinance erected a trade barrier.

The cases of Meridian v. Sippy, 54 Cal. App. (2d) 214, 128 P. (2d) 884; Grant v. Leavell, 259 Ky. 267, 82 S. W. (2d) 283, and Prescott v. City of Borger (Tex. App.), 158 S. W. (2d) 578, all deal with ordinances whose obvious purposes were to create trade barriers. If the purpose or effect of an ordinance is to erect a trade barrier, or if a regulation had no reasonable relation to a proper legislative purpose, it is, of course, invalid as a violation of the Fourteenth Amendment. If, however, an ordinance does not go beyond the reasonable demands of the occasion, and tends to accomplish the purpose of protecting the welfare and health of the people, it is not unreasonable and oppressive, and the courts will not interfere. All municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such an ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance, in the light of this knowledge, creates a prima facie presumption that it is reasonable. 3 McQuillen Mun. Corp. (2d ed.), p. 110, Sec. 951.

Each case must be judged on its own facts and not upon the basis of general statements of principles. In the case at bar, the City of Beloit passed an ordinance which in no manner limits the activity of any pasteurization plant which can conceivably seek a Beloit market. It affects adversely only the lone operator who may purchase his milk at far distant points and bring it to Beloit by truck. The city, however, has the obligation to protect its citizens against the danger of impure milk, no matter how small the quantity. It has the obligation to inspect the sources

of milk supply, no matter how far distant from the city they may be. There is a limitation beyond which the city should not be compelled to go. If the appellant is entitled to receive a license, then any similar operator, even though he may purchase his milk at a creamery 100 miles from Beloit, drawing milk from farms located a similar distance, is entitled to receive a license. A realistic approach to the problem requires a prohibition such as is contained in the Beloit ordinance. For this reason, we submit that the ordinance should be considered a legitimate exercise of legislative power.

In the case of Nebbia v. New York, 291 U. S. 502, 517, 78 L. ed. 940, 945, 54 S. Ct. 505, the court said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U. S. 197, 337, 338, 48 L. ed. 679, 700, 701, 24 S. Ct. 436. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts

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are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

We submit that the provision of the Beloit milk ordinance, requiring that milk sold within the city, for human consumption, shall be pasteurized in plants within a prescribed zone, is not in violation of the interstate commerce clause of the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the Supreme Court of the State of Wisconsin should be affirmed.

Respectfully submitted,

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Of Counsel.

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MOTION TO DISMISS APPEAL

and

SUPPORTING AFFIDAVITS.

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INDEX.

	Page
Motion to dismiss appeal	1
Affidavit of J. Arthur Moran, annexed to motion to dismiss appeal	2
Affidavit of Stanley J. Goldschmidt, City Sanitarian of City of Beloit	5
Certificate of R. H. Calland, City Clerk of Beloit	6
Copy of Ordinance No. 38 of City of Beloit	7
Certificate of R. H. Calland, City Clerk of Beloit.	8
License issued to Lawrence Dyer to sell pasteurized milk in City of Beloit	9

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Appellant,

vs.

CITY COUNCIL of the City of Beloit, Rock County, Wisconsin; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

MOTION TO DISMISS APPEAL.

Come now City Council of the City of Beloit, Rock County, Wisconsin; A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin, and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, the appellees in the above entitled appeal, and upon the annexed affidavits of J. Arthur Moran and Stanley J. Goldschmidt, move this Court that the appeal herein from the judgment of the Supreme Court of Wisconsin be dismissed, upon the ground that the cause is moot.

Dated December 29, 1947.

J. ARTHUR MORAN,
Counsel for Appellees.

AFFIDAVIT OF J. ARTHUR MORAN, ANNEXED TO MOTION TO DISMISS APPEAL.

In the
SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 275.

Lawrence Dyer, Appellant,

vs.

City Council of the City of Beloit, Rock County, Wisconsin; A. D. Telfer, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. Calland, as City Clerk of the City of Beloit, Rock County, Wisconsin, and Stanley J. Goldschmidt, City Sanitarian of the City of Beloit, Rock County, Wisconsin, Appellees.

State of Wisconsin } ss.
County of Rock }

J. Arthur Moran, being duly sworn, deposes and says:

That he is an attorney and counselor at law, admitted to practice before this Court, and that he is counsel for the appellees in the above entitled appeal;

That this action was brought by the appellant to compel the appellees to issue to him a license to sell pasteurized milk in the City of Beloit, Rock County, Wisconsin;

That on or about the 29th day of August, 1946, the appellant applied to the said City of Beloit for a license to sell pasteurized milk in said city; that appellant accompanied his application with a statement that he proposed to sell pasteurized milk purchased by him at a pasteuriza-

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tion plant at Chemung, Illinois, a distance of twenty-five miles from the said City of Beloit; that the City Council of Beloit declined to grant appellant a license because of Section 8.09 (x) (2) of the Ordinances of the City of Beloit, providing as follows:

> "(2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit."

That thereafter appellant brought this action in the Circuit Court for Rock County, Wisconsin, to compel the appellees to issue the license for which he had applied; that the Circuit Court for Rock County, Wisconsin, on December 20, 1946, dismissed appellant's bill of complaint upon the merits, and entered judgment for the appellees; that on June 10, 1947, upon appeal from said judgment, the Supreme Court of Wisconsin entered judgment affirming the judgment of the lower state court; that on the 30th day of July, 1947, the Supreme Court of Wisconsin entered an order allowing an appeal to this Court;

That after appellant had taken an appeal from the judgment of the Supreme Court of Wisconsin to this Court, and after this Court had, on October 13, 1947, noted probable jurisdiction, the City Council of Beloit, on December 15, 1947, amended Section 8.09 (x) (2) of its Ordinances to read as follows:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; provided, however, that this provision shall not be construed to prohibit the sale within the city

of pure, wholesome, pasteurized milk within the course of interstate commerce, if it affirmatively appears that such milk shall be produced, processed and transported under laws, regulations or ordinances equivalent to the requirements of this ordinance. The health officer shall have the right to satisfy himself that the health officer having jurisdiction over the production, processing and transportation of such milk is properly exercising a regulatory control."

That a certified copy of said amended ordinance, numbered 38, has been filed with the Clerk of this Court, and a true copy thereof is annexed hereto and made a part hereof;

That the appellant, Lawrence Dyer, on December 16, 1947, applied for and received a license to sell pasteurized milk in the City of Beloit, Wisconsin; that a certified copy of said license has been filed with the Clerk of this Court, and a true copy thereof is annexed hereto and made a part hereof;

That because of the enactment of the amended ordinance, as aforesaid, the above entitled suit has become moot;

That this affidavit is made in support of the motion of the appellees to dismiss the appeal herein from the judgment of the Supreme Court of Wisconsin, upon the ground that the cause is moot.

J. Arthur Moran.

Subscribed and sworn to before me this 29th day of December, 1947.

E. J. Caskey,
Notary Public, Rock County, Wisconsin.

(Notarial Seal)

My commission expires April 22, 1951.

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State of Wisconsin }
County of Rock } ss.

Stanley J. Goldschmidt, being duly sworn on oath deposes and says:

That at all times since the first day of September, 1945, he has been the duly appointed and acting sanitarian of the City of Beloit and in such capacity he has supervision of the issuance of milk licenses by the City of Beloit.

That on the 16th day of December, 1947, Lawrence Dyer, the appellant, in the case of Lawrence Dyer, appellant, vs. City of Beloit, Rock County, Wisconsin, et al., Case #275, now pending on appeal in the Supreme Court of the United States, made application for a license to sell pasteurized milk in the City of Beloit;

That a license was duly issued to him by the said City of Beloit under the date of December 16, 1947, upon payment by the said Lawrence Dyer of the said license fee of Twenty-five ($25.00) Dollars;

That the said Lawrence Dyer, acting under said license, commenced the delivery to and sale in the City of Beloit of pasteurized milk on the 18th day of December, 1947, and since said date has continued and is now selling pasteurized milk in said City of Beloit.

Stanley J. Goldschmidt.

Subscribed and sworn to before me this 29 day of December, 1947.

E. J. Caskey,
Notary Public, Rock County, Wisconsin.

(Notarial Seal)

My commission expires April 22, 1951.

STATE OF WISCONSIN
CITY OF BELOIT
OFFICE OF CITY CLERK

To All to Whom These Presents Shall Come:

I, R. H. Calland, Clerk of the City of Beloit, County of Rock and State of Wisconsin, and keeper of the seal thereof, do hereby certify that the annexed copy of Ordinance Number 38 of the Council of the City of Beloit, County of Rock, State of Wisconsin, has been compared by me with the original enrolled ordinance on file in this office, and that the same is a true copy thereof and of the whole of such ordinance.

I do further certify that said ordinance was published in full on the 17th day of December, 1947, in the Beloit Daily News, a public newspaper published at the City of Beloit, Rock County, Wisconsin, and designated by the Council of the said City of Beloit as the official newspaper for the publication of ordinances passed by said city.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the City of Beloit, Rock County, Wisconsin, at the office of the City Clerk in the said City of Beloit, this 29th day of December, 1947.

R. H. Calland,
City Clerk.

(Seal)

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ORDINANCE NO. 38.

An Ordinance Amending the Milk Ordinance.

The Council of the City of Beloit do ordain as follows:

Paragraph (2), subsection (x) of section 8.09 of the Code of General Ordinances of the City of Beloit is amended to read as follows:

Section 1:

No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; provided, however, that this provision shall not be construed to prohibit the sale within the city of pure, wholesome, pasteurized milk within the course of interstate commerce, if it affirmatively appears that such milk shall be produced, processed and transported under laws, regulations or ordinances equivalent to the requirements of this ordinance. The health officer shall have the right to satisfy himself that the health officer having jurisdiction over the production, processing and transportation of such milk is properly exercising a regulatory control.

Section 2:

This ordinance shall take effect upon passage and publication.

Ordained and enacted this 15th day of December, 1947.

John T. Wooton,
President of the Council.

Attest:

R. H. Calland,
City Clerk.

Published this 17 day of December, 1947.

STATE OF WISCONSIN
CITY OF BELOIT
OFFICE OF CITY CLERK

To All to Whom These Presents Shall Come:

I, R. H. Calland, Clerk of the City of Beloit, County of Rock and State of Wisconsin, and keeper of the seal thereof, do hereby certify that the annexed copy of License No. 532 is a true copy of the license issued to the appellant, Lawrence Dyer, to sell pasteurized milk in the City of Beloit, Rock County, Wisconsin.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the City of Beloit, Rock County, Wisconsin, at the office of the City Clerk in the said City of Beloit, this 29th day of December, 1947.

R. H. Calland,
City Clerk.

(Seal)

Non-Transferable

ORIGINAL Tag #47

CITY OF BELOIT
STATE OF WISCONSIN

No. 532

Lawrence Dyer

having paid to the City of Beloit, the sum of
Twenty Five.....Dollars, $25.00

Is Hereby Granted a

License

To: operate a dairy (to peddle Dean's Milk in Beloit)

At (Address): Poplar Grove, Illinois

Within this City, subject to the ordinances thereof and to the laws of this State.

Unless previously relinquished or revoked.

This License
expires (date): June 30, 1948

Application
approved by J. C. Springberg, M. D.

Witness my hand this 16 day of December, 1947.

R. H. Calland, City Clerk.
P. J.

Post This License

INDEX.

	Page
Affidavit of members of City Council	1
Affidavit of Stanley J. Goldschmidt	4
Affidavit of A. D. Telfer	6
Argument	7
Introductory statement	7
1. Amendment of Ordinance has rendered the case moot	10
2. The case at bar does not fall within exceptions to the rule that moot cases will be dismissed	13
3. The appellant is not entitled to declaratory relief	16

Cases Cited.

Brownlow v. Schwartz, 261 U. S. 216, 67 L. ed. 620, 43 S. Ct. 263	10
Coke v. Shanks, 218 Ky. 402, 291 S. W. 362	16
Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., Inc. (C. C. A. 5th), 296 F. 875, 43 A. L. R. 1035	15
Heller v. Shapiro, 208 Wis. 310, 242 N. W. 174	16
Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 S. Ct. 611	12
Love v. Griffith (1922; Tex. Civ. App.), 236 S. W. 239	16
Nashville, Chattanooga & St. Louis Ry. v. Wallace, 228 U. S. 249, 77 L. ed. 730, 53 S. Ct. 345	17
Re Norton, 158 N. Y. 130, 52 N. E. 723	16
Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 S. Ct. 43	11
Riley v. Bell, 184 Ind. 110, 109 N. E. 843	16

Southern P. T. Co. v. Interstate Commerce Commission, 219 U. S. 489, 55 L. ed. 310, 31 S. Ct. 279..... 12
State ex rel. Joyce v. Farr, 236 Wis. 323, 295 N. W. 21 16
State ex rel. LaFollette v. Dammann, 220 Wis. 17, 264 N. W. 627..... 17
State ex rel. Traub v. Brown, ... Del. ..., 197 A. 478.. 16
Tabor v. Hipp, 136 Ga. 123, 70 S. E. 886..... 11
Willis v. Buchman, ... Ala. ..., 199 So. 892, 132 A. L. R. 1179.....13, 15
Wingert v. First National Bank of Hagerstown, 223 U. S. 670, 56 L. ed. 605, 32 S. Ct. 391..... 12

Statutes Cited.

Wisconsin Statutes, Section 269.56 (11)..... 16

Texts Cited.

87 A. L. R., page 1206..... 16
132 A. L. R., page 1188..... 15

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 275.

LAWRENCE DYER,
Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,
Appellees.

AFFIDAVITS AND BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

AFFIDAVITS IN SUPPORT OF MOTION TO DISMISS APPEAL.

State of Wisconsin }
County of Rock } ss.

Maurice E. Christenson, E. P. Gharrity, Stuart D. Klinger, Jess J. Phillips and John T. Wootton, being first duly sworn, on oath each for himself says that he is now, and was on the 15th day of December, 1947, a duly elected and acting member of the City Council of Beloit, Wisconsin; that the said City of Beloit operates under the

City Manager plan of government, and its council, in which all legislative powers of the city vest, consists of five members; that he is not an attorney-at-law, and in the discharge of his legislative duties necessarily acts in accordance with the judgment and advice of the attorneys employed by the city in all matters involving questions of law;

That shortly before the 15th day of December, 1947, he and the other members of the City Council were advised that the attorneys representing the City of Beloit in this litigation had concluded, as the result of their further study of the law, in preparation of appellees' brief, to be submitted to this Court, that, in their judgment, the ordinance clause under attack in this case was, in all probability, a violation of the Interstate Commerce Clause of the Constitution of the United States;

That this affiant accepted the judgment of the city's attorneys in the matter, and consulted with the other members of the City Council regarding a possible change in the ordinance to conform with the views of such attorneys; that, as the result, the members of the City Council determined to adopt an amendment to the existing ordinance, embodying the suggestions contained in the model milk ordinance recommended by the United States Public Health Service; that such amendment was passed on December 15, 1947, and, as this affiant is informed and believes, the appellant, Lawrence Dyer, upon the next day applied for and received a license to deliver and sell milk in the City of Beloit, hauling the same from the pasteurization plant of the Dean Milk Company at Chemung, Illinois, a distance of twenty-five to thirty miles from the City of Beloit, and that the said Lawrence Dyer has at all times since said date continued to sell such milk in the City of Beloit, all in conformity with the ordinance as amended;

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That the ordinance, as amended, represents the settled legislative policy of the City of Beloit; that there is no purpose on the part of this affiant, as a member of the City Council of Beloit, and, in his judgment, upon the part of any other member of said City Council, to repeal or modify the ordinance in any way detrimental to the right of the said Lawrence Dyer to continue the sale of milk in the City of Beloit in the manner he is now doing, or to deprive anyone else of the same opportunity under the ordinance, as amended; that this affiant believes that he would be committing a fraud upon this Court, as well as upon the said Lawrence Dyer, or any other milk dealer similarly situated, and would be guilty of the utmost treachery and deceit, if he were to entertain any thought of changing the ordinance to deprive the said Lawrence Dyer of a license to sell milk in the City of Beloit; that the charge made in the affidavit of the said Lawrence Dyer upon his motion to deny appellees' motion to dismiss the appeal in this case and in the brief accompanying said motion, to the effect that the City Council of Beloit, Wisconsin, intends to deprive the said Lawrence Dyer of a license, after the dismissal of the appeal, by modifying the amended ordinance, is untrue in every respect.

Maurice E. Christenson,
Jess J. Phillips,
Stuart D. Klinger,
E. P. Gharrity,
John T. Wootton.

Subscribed and sworn to before me this 19th day of January, 1948.

Jane Finnegan,
Notary Public, Rock County, Wisconsin.

My commission expires June 4, 1950.

(Seal)

State of Wisconsin } ss.
County of Rock }

Stanley J. Goldschmidt, being first duly sworn, on his oath says that at all times since the 1st day of September, 1945, he has been the duly appointed and acting Sanitarian of the City of Beloit, under the general direction of the City Health Officer, and in such capacity has had charge of the issuance of milk and other food licenses in the City of Beloit;

That all milk and other food licenses issued by the City of Beloit are upon the same printed form, and bear in printed words upon the face thereof the following phraseology:

"Within this City, subject to the ordinances thereof and to the laws of the State.

"Unless previously relinquished or revoked."

That the license form delivered to Lawrence Dyer under date of December 16, 1947, bearing the foregoing phraseology, does not differ in any respect from any other license form delivered to the other milk dealers and purveyors of food in the City of Beloit;

That the license issued to the said Lawrence Dyer expires on June 30, 1948, as do all other milk licenses under the terms of the ordinance; that all milk licenses are issued for a period of one year, and expire on the 30th day of June of the subsequent year; that the license issued to Lawrence Dyer is in all respects in the same category as the licenses issued to the other milk dealers of the city;

That the said Lawrence Dyer specifically applied for a license to deliver to the City of Beloit for sale pasteurized milk received by him from Dean Milk Company at its pasteurization plant in Chemung, Illinois; that he has not applied for a license to deliver milk from any pasteurization plant located in the State of Wisconsin; that since receiving his license he has sold no milk in the City of

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Beloit except that received from the Chemung plant of the Dean Milk Company; that he has never indicated a purpose to do otherwise than sell the milk purchased by him from the Dean Milk Company in the City of Beloit; that he has advertised in the local newspaper the fact that the milk of the Dean Milk Company was now on sale in the City of Beloit; that, as this affiant is informed and believes, there is no pasteurization plant operated by the Dean Milk Company in the State of Wisconsin;

That, under the amended ordinance, it was unnecessary for this affiant, as City Sanitarian, or for his assistant, to inspect farms furnishing milk to the pasteurization plant of the Dean Milk Company; that it was merely his duty to ascertain that such milk was produced, processed and delivered under properly enforced laws, regulations and ordinances equivalent to the Beloit ordinance; that in the matter of appellant's application for a license, this affiant satisfied himself that these requirements of the amended ordinance of Beloit were met, and thereupon issued a license to the appellant; that, in the exercise of his official duties, this affiant has become acquainted with the business activities of the said Lawrence Dyer; that the said Lawrence Dyer is solely engaged in delivering to the City of Beloit, Wisconsin, the City of South Beloit, Illinois (which adjoins the first city), and stores lying in the environs of said two cities, the milk produced by the Dean Milk Company; that his business activities are wholly limited to the area described, and do not embrace any city in the State of Wisconsin, except the City of Beloit.

Stanley J. Goldschmidt.

Subscribed and sworn to before me this 20th day of January, 1948.

E. J. Caskey,
Notary Public, Rock County, Wisconsin.

My commission expires April 22, 1951.

(Seal)

State of Wisconsin }
County of Rock } ss.

A. D. Telfer, being first duly sworn, on oath says that he is the duly appointed and acting City Manager of the City of Beloit, Rock County, Wisconsin;

That shortly after the 16th day of December, 1947, a letter addressed by Helen Newman, librarian of the Supreme Court of the United States, to the City Council of the City of Beloit, requesting a statement of the legislative history of the ordinance clause under attack in this case, was handed to this affiant for attention;

That on the 26th day of December, 1947, he addressed to the said Helen Newman a letter setting forth the legislative history of the ordinance as he was able to compile it from the records of the City of Beloit.

A. D. Telfer.

Subscribed and sworn to before me this 19th day of January, 1948.

Jane Finnegan,
Notary Public, Rock County, Wisconsin.

My commission expires June 4, 1950.

(Seal)

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ARGUMENT.

INTRODUCTORY STATEMENT.

The appellant, Lawrence Dyer, before the commencement of this suit applied to the City of Beloit, Wisconsin, for a license to sell pasteurized milk in said city. He stated, at the time of making the application, that he proposed to purchase pasteurized milk at the dairy of Dean Milk Company at Chemung, Illinois, and haul the same to Beloit, where he proposed to make sales to the retail trade. The City declined to give him a license, upon the ground that its milk ordinance provided that "no pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit" (R. 22). Chemung, Illinois, is between twenty-five and thirty miles from the point indicated in the ordinance (R. 8).

The appellant then filed a petition for a Writ of Mandamus in the Circuit Court for Rock County, Wisconsin, to compel the issuance of a license. After issue joined and a trial, the Circuit Court dismissed the petition and entered judgment for the defendants. Upon appeal, the Supreme Court of Wisconsin affirmed the judgment of the lower court. An appeal was then taken by Dyer to this Court.

While the appeal was pending in this Court, the attorneys representing the defendants in the litigation advised the members of the City Council of Beloit that they had concluded, as a result of their further study, that the ordinance clause above given was in violation of the Interstate Commerce Clause of the Constitution of the United States. Thereupon, on December 15, 1947, the City Council passed an amendment to the ordinance, in response to

the judgment and advice of its attorneys. The amendment provides that the ordinance shall not be construed to prohibit the sale within the City of Beloit of pure, wholesome pasteurized milk within the course of interstate commerce, if produced, processed and transported under laws, regulations and ordinances equivalent to the requirements of the Beloit ordinance.

The appellant applied for and received a license to sell milk in the City of Beloit immediately after the passage of the amendment, and at once commenced the sale of milk in Beloit, hauling the milk from the pasteurization plant of Dean Milk Company at Chemung, Illinois. He has since continued to do so. He has, therefore, accomplished the full purpose of his lawsuit.

He now claims, however, that a controversy still exists between him and the appellees. He complains that the license issued to him contains the following objectionable clause:

> "Unless previously relinquished or revoked. This license expires June 30, 1948."

The appellant is grasping at straws. The Beloit milk ordinance provides that all licenses issued thereunder shall expire on June 30th of each year (R. 13). The ordinance also provides the conditions under which a license may be revoked (R. 23). All licenses issued by the City of Beloit contain the phraseology to which the appellant now objects.

The appellant also contends that a controversy still exists, because the license and ordinance do not permit him to sell or distribute milk within the course of intrastate commerce. The appellant has no complaint upon this score, because he did not apply for a license to sell milk in intrastate commerce. His application specifically

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states that he proposes to transport milk from Illinois to Wisconsin for sale at retail stores in Beloit. He asserts no intention to make future sales of milk delivered by him in Beloit from other points in Wisconsin. He deals exclusively in the sale of Dean's milk. The Dean Milk Company has no plant in this State. The appellant does not propose to sell milk except within the course of interstate commerce.

In his effort to demonstrate that this case is not moot, appellant attacks the integrity and good faith of the City of Beloit and particularly its councilmen. He claims that they are so lacking in character and integrity that they will repeal the amended ordinance after the appeal to this Court is dismissed, and thereby leave him without adequate redress for the wrong inflicted. The bases for this fanciful conclusion are a newspaper account of a public meeting and remarks of counsel contained in a brief filed in this case in the Supreme Court of Wisconsin. The answer is that the elected representatives of the people of Beloit on their City Council are men of character, integrity and intelligence. They understand fully their moral obligations, and intend to keep them. Mr. Dyer may continue to sell his milk in Beloit as long as he wishes, provided it is produced, processed and transported under other regulations equivalent to those in the Beloit ordinance.

In a further desperate effort to carry his point, the appellant charges, upon information and belief, that the City did not respond to a request of the Librarian of this Court for information respecting the history and background of the ordinance. This statement is contained in an affidavit of the appellant made on January 6, 1948, in connection with his motion to deny appellees' motion to dismiss the appeal. Had the appellant enquired, he would have learned that the City Manager of Beloit did furnish

the information requested in a letter sent by him on December 26, 1947.

I.

AMENDMENT OF ORDINANCE HAS RENDERED THE CASE MOOT.

The appellant has obtained everything he requested as a result of the amendment of the ordinance. Whether this Court affirms or reverses the judgment of the Supreme Court of Wisconsin, the appellant has the license he sought, and he will continue to have such license as long as he wishes, and complies with the various provisions of the ordinance, as now written.

In Brownlow v. Schwartz, 261 U. S. 216, 67 L. ed. 620, 43 S. Ct. 263, the defendant in error (petitioner below) filed a petition for a writ of mandamus, requiring respondents to issue a building permit to erect a building for business purposes. The lower court entered judgment dismissing the petition. Upon appeal, the Circuit Court of Appeals reversed the judgment and remanded the cause, with directions to issue the writ, as prayed. Following this, a writ of error was allowed. After the decision of the Circuit Court of Appeals, and before the allowance of the writ of error, a permit was granted and the building was erected. The Court, in remanding the case, with directions to dismiss the bill, said:

> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly void an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists

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is a proceeding which this court uniformly has declined to entertain."

In the case of Tabor v. Hipp, 136 Ga. 123, 70 S. E. 886, the plaintiffs, claiming to be the duly constituted registrars of Gilmer County, Georgia, sought a writ of mandamus against the ordinary of that county to compel him to deliver to them certain books and documents for use in connection with their official work. The trial court granted the writ. Later it denied a motion for a new trial upon the ground that the books and documents had been delivered, the registrars had completed their work and had returned them to the defendant. Upon appeal, the Supreme Court of Georgia ordered the writ dismissed upon the ground that the case was moot. The Court said that there was no existing controversy and that a reversal would give no effectual relief to the defendant. The Court added that the defendant could not insist upon a decision merely to determine the issue upon which of the parties to the litigation the costs should devolve.

The case of Richardson v. McChesney, 218 U. S. 487, 54 L. Ed. 1121, 31 S. Ct. 43, came to this Court upon a writ of error to reverse a decree of a state court refusing to require a state official of Kentucky, when certifying the names of nominees for Congress to the Clerks of the various County Courts, to proceed under the Kentucky Apportionment Act of April 15, 1882, rather than under the act of March 12, 1898, which was attacked as invalid. The election affected by the decree had been held, and the persons elected had taken their seats. This Court dismissed the writ and said:

"The duty of the Court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions, however

such opinion might influence future action in like circumstances."

In the case of Jones V. Montague, 194 U. S. 147, 48 L. Ed. 913, 24 S. Ct. 611, this Court had under consideration a writ of prohibition to prevent a Board of State Canvassers in Virginia from canvassing election returns, declaring the results and giving certificates of election to the parties found to be elected, upon the ground that the election was void. A lower court had denied the writ. A motion was made to dismiss the case upon the ground that everything sought to be prohibited had been done after dismissal in the lower court. This court granted the motion on the ground that any adjudication the court might make would only be ineffectual decision of the question, whether or not petitioners were wronged by what had been fully accomplished.

In Wingert v. First National Bank of Hagerstown, 223 U. S. 670, 56 L. Ed. 605, 32 S. Ct. 391, this court dismissed an appeal from a Circuit Court of Appeals which had dismissed a bill to restrain the erection of a bank building, upon the ground that the act was ultra vires, and commercially unwise. During the pendency of the case, the new building had been constructed. The Court pointed out that if the defendants, by their acts, had inflicted an actionable wrong upon the plaintiffs, the bill would be retained for the assessment of damages. No such wrong having been inflicted, the appeal could be considered as being prosecuted for costs only, and, therefore, must be dismissed.

The case at bar differs from Southern P. T. Co. v. Interstate Commerce Commission, 219 U. S. 489, 55 L. ed. 310, 31 S. Ct. 279 (cited in appellant's brief). In that case collateral rights of the parties dependent upon its decision

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would have been left undetermined. In the instant case, no such collateral rights exist. The alleged fear of the appellant that the City Council of Beloit may at some future time revoke the amended ordinance and thus deprive him of a license, whether it exists or not, and whether or not it is justified, if it does exist, is not a collateral right as described in the Interstate Commerce Commission case. In that case it was pointed out that both the Government and the carriers might have their rights determined by the Commission in the future, without a chance of redress. The appellant, Lawrence Dyer, will always have redress in the courts. If he does not wish to commence a future action in the State courts of Wisconsin, he may commence an action in the appropriate Federal Court.

II.

THE CASE AT BAR DOES NOT FALL WITHIN THE EXCEPTIONS TO THE RULE THAT MOOT CASES WILL BE DISMISSED.

In Willis v. Buchman, ... Ala. ..., 199 So. 892, 132 A. L. R. 1179, the Supreme Court of Alabama, in considering whether a case was moot, said:

> "There is no doubt of the general rule that if pending an appeal 'appellee . . . does, or relinquishes the right to do, some act in respect to which the appeal was taken,' the appeal should be dismissed. Caldwell v. Loveless, 17 Ala. App. 381, 85 So. 307; 3 Am. Jur. 308, section 733; 4 Corpus Juris Secundum, Appeal and Error, p. 1955, Par. 1354, f, page 1967, Par. 1362; Alabama Power Co. v. City of Sheffield, supra.
>
> "As to this there is no controversy. But it is contended that this situation is within the exceptions to such rule. There are two exceptions to it, (1) is where, if no decision of the question is made on the

appeal, collateral rights of the parties dependent upon its decision will be left undetermined, as settled in the following cases: Southern Pacific Co. et al. v. I. C. C., 219 U. S. 433, 31 S. Ct. 288, 55 L. ed. 283; Boise City Irr. & Land Co. v. Clark, 9 Cir., 131 F. 415; Postal Tel.-C. Co. v. City of Montgomery, 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B 554; Bradford v. State, 226 Ala. 342, 147 So. 182. And (2) where the rights of the public would thereby be affected. Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498, 31 S. Ct. 279, 55 L. ed. 310; Boise City Irr. & Land Co. v. Clark, supra; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; 3 Am. Jur. 310, note 10; 4 Corpus Juris Secundum, Appeal and Error, Par. 1362, p. 1969, note 6."

A moot case may be retained in the appellate court or remanded for the purpose of assessing damages, or to grant the appellant relief for which he has no adequate judicial redress, or to adjudicate existing rights and equities of the parties. In these instances, rights of the parties collateral to the main issue (which is moot) are determined in the litigation and should be settled. Such considerations do not exist in the case at bar. The appellant has accomplished the whole purpose of his lawsuit. He is not entitled to damages. There are no existing rights and equities which require adjudication. While, for the purpose of this motion, he asserts a fear of retaliation upon the part of the City, such fear, even if experienced, is utterly unfounded and does not, in any event, constitute a justiciable controversy in this case.

The appellant advances the novel argument that the appellees have placed in issue the rights of the public, because their counsel, in a brief filed herein, asserted that it was in the interests of the Beloit public that the ordinance (before its amendment), be upheld. We find no adjudi-

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cated case holding that the arguments of counsel can bring a case within the exception to the general rule that courts will, in some instances, adjudicate an abstract question where the rights of the public are affected. It has been held, however, that the mere statements by counsel do not make a question moot. Habirshaw Electric Cable Co. v. Habirshaw Electric Co., Inc. (C. C. A. 5th), 296 F. 875, 43 A. L. R. 1035. Whether the case at bar involves a controversy of great public interest, in the sense in which the term is used, must depend upon the facts in the case, and not upon the statements of counsel.

The author of the annotations contained in 132 A. L. R. on page 1188, makes the following statement:

> "It is not easy to state any hard and fast rules by which questions are of sufficient public interest to justify refusal to dismiss an appeal which has become moot or which the parties wish to have dismissed may be distinguished from questions which are not of such interest, since the matter rests generally in the discretion of the appellate court in each particular case. Some general considerations bearing upon the problem may, however, be pointed out.
>
> "In the first place it must be remembered that the general rule is to dismiss an appeal which has become moot or which the parties desire to have dismissed, and that the retention of such an appeal because of the public interest therein is an exception to that rule. Hence the inclination of the courts is to refuse dismissal on this ground only under exceptional circumstances and where the public interest clearly appears."

The mere fact that the validity or construction of a statute or ordinance is involved in an appeal is not generally regarded as sufficient in itself to justify or require that a dismissal be refused. Willis v. Buchman, supra;

State ex rel. Traub v. Brown (1928, ... Del. ..., 197 A. 478; Riley v. Bell (1915), 184 Ind. 110, 109 N. E. 843; Coke v. Shanks (1927), 218 Ky. 402, 291 S. W. 362; Re Norton (1899), 158 N. Y. 130, 52 N. E. 723; Love v. Griffith (1922; Tex. Civ. App.), 236 S. W. 239.

There are no exceptional circumstances in this case which require an adjudication in the public interest. The questions raised call for the application of general principles of constitutional law. The amendment to the ordinance has made their application a mere matter of abstract interest. There are no public rights which require protection.

III.

THE APPELLANT IS NOT ENTITLED TO DECLARATORY RELIEF.

While the appellant might have commenced an action under the Declaratory Judgments Act of Wisconsin, he did not do so. Had he done so, it would have been necessary for him to join in the action the Attorney General of Wisconsin as a party in interest. Section 269.56 (11), Wisconsin Statutes 1947. He is, therefore, not entitled to a judicial consideration of a prayer for a declaratory judgment under Wisconsin law, unless all parties in interest have been joined. State ex rel. Joyce v. Farr, 236 Wis. 323, 295 N. W. 21.

The Supreme Court of Wisconsin, in the case of Heller v. Shapiro, 208 Wis. 310, 242 N. W. 174, held that the declaratory judgment statute of Wisconsin justifies a declaration of rights only upon an existing state of facts, not one upon a state of facts that may or may not arise in the future. This appears to be the general rule in the United States. 87 A. L. R., page 1206.

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In the case of State ex rel. LaFollette v. Dammann, 220 Wis. 17, 264 N. W. 627, the Supreme Court of Wisconsin held that one of the conditions which must exist in order that declaratory relief may be obtained is that there must exist a judiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it. The appellees in the case at bar no longer have any interest in contesting appellant's claim to a license, which he has already received and is enjoying.

The case of Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 77 L. ed. 730, 736, 53 S. Ct. 345, is not in point. The narrow question there presented was whether an action commenced under a Declaratory Judgments Act of a State could be entertained in this Court.

There is clearly no merit in appellant's contention that he is entitled to a declaratory judgment in this Court.

It is submitted that the motion of the appellees herein to dismiss the appeal from the judgment of the Supreme Court of Wisconsin should be granted upon the ground that the cause is moot.

Respectfully submitted,

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Delavan, Wisconsin,
Attorney for Appellees.

EARL J. CASKEY,
Beloit, Wisconsin,
Of Counsel.

FEBRUARY 2, 1948.

Per Curiam Decision.

No. 275. DYER *v.* CITY COUNCIL OF BELOIT ET AL. Appeal from the Supreme Court of Wisconsin. Submitted December 8, 1947. Decided February 2, 1948. *Per Curiam:* On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the Supreme Court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate. Costs in this Court will be taxed against the appellees. MR. JUSTICE BLACK and MR. JUSTICE BURTON are of the opinion that costs should be divided equally. *Claude D. Stout* submitted on brief for appellant. *J. Arthur Moran* submitted on brief for appellees. Reported below: 250 Wis. 613, 27 N. W. 2d 733.